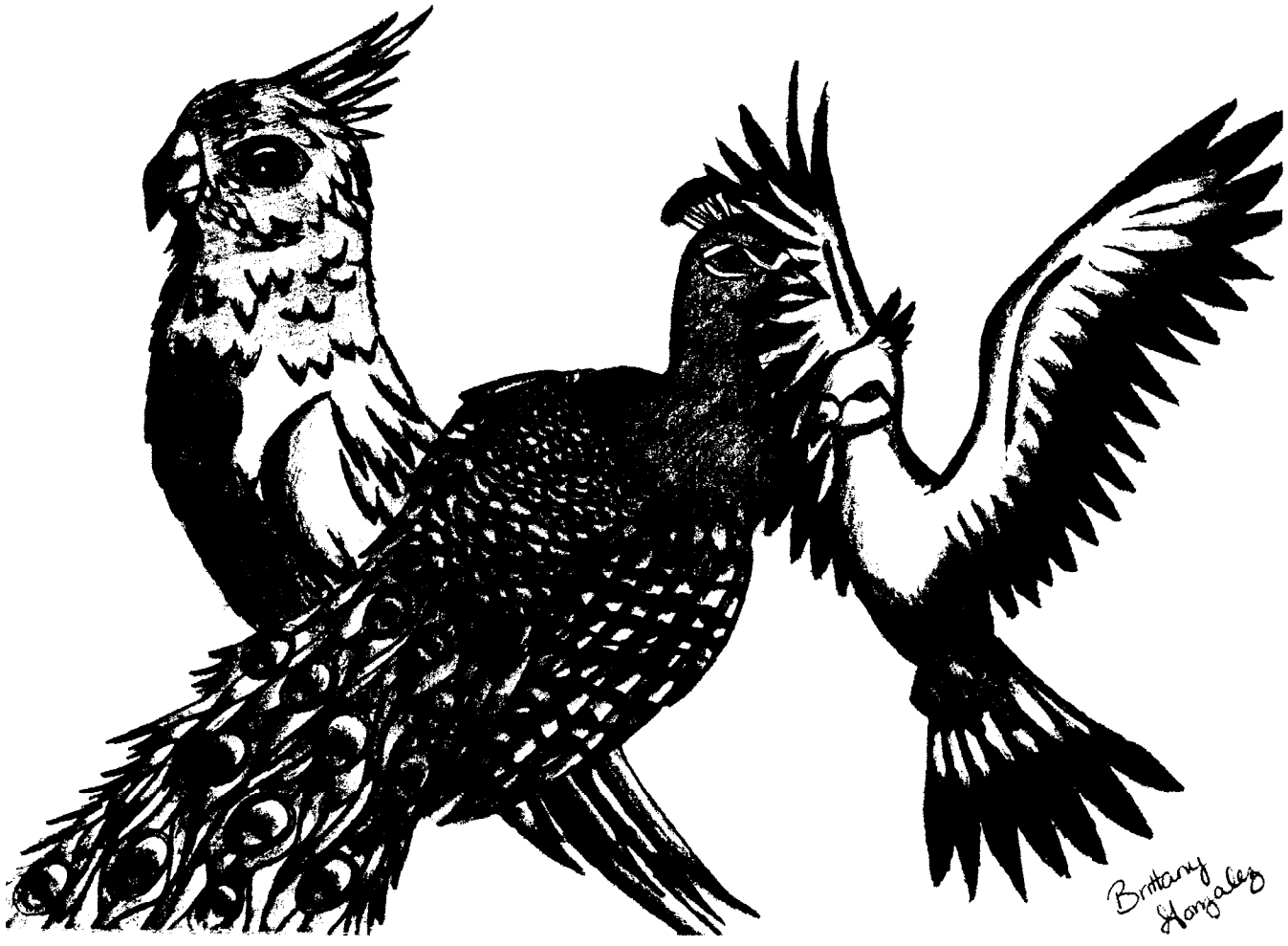
TEXAS REGISTER

Volume 33 Number 27 *July 4, 2008* *Pages 5079 - 5428*



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.state.tx.us

IN THIS ISSUE

GOVERNOR

PROPOSED RULES

STATE OFFICE OF ADMINISTRATIVE HEARINGS

RULES OF PROCEDURES

RULES OF PROCEDURE

RULES OF PROCEDURE FOR ADMINISTRATIVE LICENSE SUSPENSION PROCEEDINGS

RULES OF PROCEDURE FOR ADMINISTRATIVE LICENSE SUSPENSION HEARINGS

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

REIMBURSEMENT RATES

MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

TEXAS DEPARTMENT OF AGRICULTURE

PESTICIDES

FINANCE COMMISSION OF TEXAS

RULES OF PROCEDURE FOR CONTESTED CASE HEARINGS, APPEALS, AND RULEMAKINGS

TEXAS DEPARTMENT OF BANKING

PREPAID FUNERAL CONTRACTS

OFFICE OF CONSUMER CREDIT COMMISSIONER

MOTOR VEHICLE INSTALLMENT SALES

CREDIT UNION DEPARTMENT

CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

JOINT FINANCIAL REGULATORY AGENCIES

HOME EQUITY LENDING PROCEDURES

HOME EQUITY LENDING

TEXAS BOARD OF ARCHITECTURAL EXAMINERS

WITHDRAWN RULES

ADOPTED RULES

RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

Office of the Attorney General

Coastal Coordination Council

Office of Consumer Credit Commissioner

Court of Criminal Appeals

Texas Education Agency

Texas Commission on Environmental Quality

Texas Ethics Commission

Texas Facilities Commission

General Land Office

Department of State Health Services

Texas Health and Human Services Commission

Texas Department of Insurance

Texas Lottery Commission

Texas Parks and Wildlife Department

Public Utility Commission of Texas

Texas Residential Construction Commission

Office of Rural Community Affairs

Stephen F. Austin State University

Texas Department of Transportation

The Texas A&M University System

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for June 16, 2008

Appointed to the Gulf Coast Waste Disposal Authority Board of Directors, effective June 18, 2008, for a term to expire August 31, 2008, Randy Jarrell of Crystal Beach (replacing Louis S. Dell'Olio of Galveston whose term expired).

Appointed to the Gulf Coast Waste Disposal Authority Board of Directors, effective June 18, 2008, for a term to expire August 31, 2009, Zoe M. Barinaga of Houston (Ms. Barinaga is being reappointed).

Appointed to the Manufactured Housing Board for a term to expire January 31, 2011, Devora Mitchell of Kermit (replacing Valeri Stiers Malone of Holliday who has resigned).

Appointed to the Texas Council on Purchasing from People with Disabilities for a term to expire January 31, 2009, Victor Kilman of Lubbock (replacing Floyd Glen Self, Jr. of Austin who resigned).

Appointed to the Texas Public Finance Authority for a term to expire February 1, 2009, Gary Eugene Wood of Austin (replacing Carin Marcy Barth of Houston who resigned).

Appointed to the Texas State Board of Social Worker Examiners for a term to expire February 1, 2009, Nary Spears of Houston.

Appointed to the Texas State Board of Social Worker Examiners for a term to expire February 1, 2013, Timothy Brown of Bryan (replacing Julia Ann Dunaway of Fort Worth who resigned).

Appointments for June 18, 2008

Appointed to the State Board of Registration for Professional Engineers for a term to expire September 26, 2013, Elvira Reyna of Little Elm (replacing Elsie Allen of Fort Worth whose term expired).

Appointed to the State Securities Board for a term to expire January 20, 2009, Derrick Mitchell of Houston (replacing William R. Smith of Pflugerville who resigned).

Appointed to the State Securities Board for a term to expire January 20, 2013, E. Wally Kinney of Dripping Springs (replacing Jack Ladd of Midland whose term expired).

Appointed to the State Securities Board for a term to expire January 20, 2013, Beth Ann Blackwood of Dallas (Ms. Blackwood is being reappointed).

Appointed as Chief Administrative Law Judge, effective July 1, 2008, for a term to expire May 15, 2010, Lyn Cathleen Parsley of Austin (replacing Shelia Taylor of Austin who resigned).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2011, Gary Jones of Beeville (replacing J. R. Schneider of San Antonio whose term expired).

Appointed to the Coastal Water Authority Board of Directors for a term to expire April 1, 2009, Alan Russell Senac of Beach City (replacing Gary Nelson of Baytown whose term expired).

Appointed to the Coastal Water Authority Board of Directors for a term to expire April 1, 2010, Ray Stoesser of Dayton (replacing Buster French of Dayton whose term expired).

Appointed to the Gulf of Mexico Program Citizens Advisory Committee for a term to expire at the pleasure of the Governor, Wayne D. Marty of San Antonio.

Appointed to the Gulf of Mexico Program Citizens Advisory Committee for a term to expire at the pleasure of the Governor, Mayor Vic Pierson of Jamaica Beach (replacing David Alex of Harlingen).

Appointed to the Gulf of Mexico Program Citizens Advisory Committee for a term to expire at the pleasure of the Governor, Ravi Singhania of Houston (replacing James Kachtick of Houston).

Appointed to the Gulf of Mexico Program Citizens Advisory Committee for a term to expire at the pleasure of the Governor, John Sullivan of Galveston (replacing Ned Meister of Lorena).

Appointed to the Gulf of Mexico Program Citizens Advisory Committee for a term to expire at the pleasure of the Governor, Mary Ellen Whitworth of Houston (Ms. Whitworth is being reappointed to the board).

Appointed to the OneStar National Service Commission for a term to expire March 15, 2011, Barry Anderson of Grand Prairie (Mr. Anderson is being reappointed).

Appointed to the Gulf of Mexico Program Policy Review Board for a term to expire at the pleasure of the Governor, Hector Steven "Buddy" Garcia of Austin (replacing Kathleen White of Rosanky who no longer qualifies.

Appointments for June 20, 2008

Appointed to the Texas Growth Fund Board of Trustees for a term to expire February 1, 2011, James Michael Bell of Fredericksburg (Mr. Bell is being reappointed).

Appointed to the Texas Growth Fund Board of Trustees for a term to expire February 1, 2011, Patsy Waller Nichols of Austin (Ms. Nichols is being reappointed. She is filling Alan W. Steelman's expired position on the board).

Appointed to the Board for Lease of Texas Department of Criminal Justice Lands, for a term to expire September 1, 2009, Wesley Lloyd of Waco (replacing Spencer Hayes of Austin whose term expired).

Appointed to the State Pension Review Board for a term to expire January 31, 2011, Jerry Massengale of Lubbock (replacing Rafael Cantu of Mission whose term expired).

Appointed to the Health and Human Services Council for a term to expire February 1, 2013, Leon Leach of Houston (Mr. Leach is being reappointed).

Appointed to the Health and Human Services Council for a term to expire February 1, 2013, Sharon Barnes of Port Lavaca (Ms. Barnes is being reappointed).

Appointed to the Health and Human Services Council for a term to expire February 1, 2013, Ronald T. Luke of Austin (Dr. Luke is being reappointed).

Appointed to the Texas Council on Autism and Pervasive Development Disorders for a term to expire February 1, 2009, Mirella Garcia of El Paso (replacing Donna Geiger of Austin who resigned).

Appointed to the Texas Council on Autism and Pervasive Development Disorders for a term to expire February 1, 2010, Pam Rollins of Dallas (replacing Richard Garnett of Fort Worth whose term expired.

Appointed to the Texas Council on Autism and Pervasive Development Disorders for a term to expire February 1, 2010, Michael Bernoski of Cedar Park (replacing Margaret Cowen of San Antonio whose term expired).

Appointed to the Texas Council on Autism and Pervasive Development Disorders for a term to expire February 1, 2010, Stephanie Sokolosky of Lubbock (replacing Opal Irvin of Dime Box whose term expired).

Rick Perry, Governor

TRD-200803311

♦ ♦ ♦

Proclamation 41-3148

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas do hereby certify that 229 counties in Texas are threatened by extreme fire hazard. Dry frontal passages pose significant fire danger because of the large amount of cured grass across the state. This threat exists in the following counties in Texas:

Anderson, Andrews, Aransas, Archer, Armstrong, Atascosa, Austin, Bailey, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Blanco, Borden, Bosque, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Caldwell, Calhoun, Callahan, Cameron, Carson, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collin, Collingsworth, Comal, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dallas, Dawson, Deaf Smith, Delta, Denton, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Ellis, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Franklin, Freestone, Frio, Gaines, Galveston, Garza, Gillespie, Glasscock, Gonzales, Gray, Grayson, Grimes, Guadalupe, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harrison, Hartley, Haskell, Hays, Hemphill, Henderson, Hidalgo, Hill, Hockley, Hood, Hopkins, Houston, Howard, Hudspeth, Hunt, Hutchinson, Irion, Jack, Jasper, Jeff Davis, Jim Hogg, Jim Wells, Johnson, Jones, Karnes, Kaufman, Kenedy, Kendall, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, LaSalle, Lamar, Lamb, Lampasas, Lee, Leon, Liberty, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Martin, Mason, Maverick, McCulloch, McLennan, McMullen, Medina, Menard, Midland, Milam, Mills, Mitchell, Montague, Montgomery, Moore, Motley, Navarro, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Palo Pinto, Panola, Parker, Parmer, Pecos, Potter, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Rockwall, Runnels, Rusk, Sabine, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Sherman, Smith, Somervell, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Tarrant, Taylor, Terrell, Terry, Throckmorton, Titus, Tom Green, Travis, Tyler, Upshur, Upton, Uvalde, Val Verde, Van Zandt, Walker, Waller, Ward, Washington, Webb, Wheeler, Wichita, Wilbarger, Willacy, Williamson, Wilson, Winkler, Wise, Wood, Yoakum, Young, Zapata and Zavala.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew my January 29, 2008, proclamation and declare a state of disaster in the counties listed above based on the existence of such threat and direct that all necessary measures both public and private as authorized under Section 418.017 of the code be implemented to meet that threat.

As provided in Section 418.016, all rules and regulations that may inhibit or filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 1st day of May, 2008.

Rick Perry, Governor

Attested by: Phil Wilson, Secretary of State

TRD-200803314

♦ ♦ ♦

Proclamation 41-3149

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, the resignation of the Honorable Kyle Janek has caused a vacancy to exist in the Texas State Senate District No. 17 which consists of parts of Brazoria, Chambers, Fort Bend, Galveston, Harris, and Jefferson Counties; and

WHEREAS, Article III, Section 13 of the Texas Constitution and Section 203.002 of the Texas Election Code require that a special election be ordered upon such vacancy; and

WHEREAS, Section 3.003 of the Texas Election Code, requires the election to be ordered by proclamation of the Governor;

NOW, THEREFORE, I, RICK PERRY, Governor of Texas, under the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special election to be held in District No. 17 on Tuesday, November 4, 2008, for the purpose of electing a State Senator for Senate District No. 17 to serve out the unexpired term of the Honorable Kyle Janek.

Candidates who wish to have their names placed on the special election ballot must file their applications with the Secretary of State no later than 5:00 p.m. on August 29, 2008.

Early voting by personal appearance shall begin on October 20, 2008, in accordance with Section 85.001 of the Texas Election Code.

A copy of this order shall be mailed immediately to the County Judges of Brazoria, Chambers, Fort Bend, Galveston, Harris, and Jefferson Counties; and all appropriate writs will be issued and all proper proceedings will be followed for the purpose that said election may be held to fill the vacancy in District No. 17 and its result proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 2nd day of June, 2008.

Rick Perry, Governor

Attested by: Phil Wilson, Secretary of State

TRD-200803315

♦ ♦ ♦

Proclamation 41-3150

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that 156 counties in Texas are threatened by extreme fire hazard. Dry frontal passages

pose significant fire danger because of the large amount of cured grass across the state. This threat exists in the following counties in Texas:

Anderson, Andrews, Angelina, Aransas, Armstrong, Atascosa, Austin, Bailey, Bandera, Bastrop, Bee, Bexar, Brazos, Brazoria, Brewster, Brooks, Brown, Burleson, Burnet, Caldwell, Calhoun, Cameron, Carson, Chambers, Cherokee, Childress, Clay, Cochran, Coleman, Colorado, Comal, Comanche, Crane, Crockett, Culberson, Dallam, Dawson, Deaf Smith, DeWitt, Dimmit, Duval, Ector, Edwards, El Paso, Erath, Fayette, Frio, Ft. Bend, Gaines, Galveston, Garza, Gillespie, Glasscock, Goliad, Gonzales, Grimes, Guadalupe, Hansford, Hardin, Harris, Haskell, Hays, Hidalgo, Houston, Howard, Hudspeth, Irion, Jackson, Jasper, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Karnes, Kenedy, Kendall, Kerr, King, Kinney, Kimble, Kleberg, Knox, LaSalle, Lamb, Lavaca, Lee, Leon, Liberty, Lipscomb, Live Oak, Loving, Lynn, Madison, Martin, Mason, Matagorda, Maverick, McMullen, Medina, Menard, Midland, Montgomery, Nacogdoches, Newton, Nueces, Oldham, Orange, Palo Pinto, Panola, Parmer, Pecos, Polk, Potter, Presidio, Randall, Reagan, Real, Reeves, Refugio, Robertson, Sabine, San Jacinto, San Patricio, Schleicher, Shelby, Sherman, San Augustine, Starr, Sterling, Stonewall, Sutton, Terrell, Terry, Throckmorton, Tom Green, Travis, Trinity, Tyler, Upton, Uvalde, Val Verde, Victoria, Walker, Waller, Ward, Washington, Webb, Wharton, Wichita, Willacy, Williamson, Wilson, Winkler, Yoakum, Zapata and Zavala.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew my May 1, 2008 proclamation and declare a state of disaster in the counties listed above based on the existence of such threat and direct that all necessary measures both public and private as authorized under Section 418.017 of the code be implemented to meet that threat.

As provided in section 418.016, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 6th day of June, 2008.

Rick Perry, Governor

Attested by: Phil Wilson, Secretary of State

TRD-200803316

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 155. RULES OF PROCEDURES

1 TAC §§155.1, 155.3, 155.5, 155.7, 155.9, 155.11, 155.13, 155.15, 155.17, 155.19, 155.21, 155.23, 155.25, 155.27, 155.29 - 155.31, 155.33, 155.35, 155.37, 155.39, 155.41, 155.43, 155.45, 155.47, 155.49, 155.51, 155.53, 155.55 - 155.57, 155.59

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the State Office of Administrative Hearings or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The State Office of Administrative Hearings (SOAH) proposes to repeal §§155.1, 155.3, 155.5, 155.7, 155.9, 155.11, 155.13, 155.15, 155.17, 155.19, 155.21, 155.23, 155.25, 155.27, 155.29, 155.30, 155.31, 155.33, 155.35, 155.37, 155.39, 155.41, 155.43, 155.45, 155.47, 155.49, 155.51, 155.53, 155.55, 155.56, 155.57, and 155.59.

The existing rules have been developed to provide a uniform set of procedural rules to be followed in contested cases at SOAH. Repeal of the existing rules will allow the simultaneous adoption of new rules, which are being concurrently proposed, that remain uniform in application but that are clearer and easier to use.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the repeals are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the repeals are in effect, the anticipated public benefit will be to ensure more uniform, clearer, and better-organized guidelines for hearing processes in the many cases referred to the State Office of Administrative Hearings by its numerous referring agencies. There will be no effect on small businesses as a result of enforcing the repeals. There is no anticipated economic cost to individuals who are required to comply with the proposed repeals.

Written comments on the proposed repeals must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The repeals are proposed under Government Code, Chapter 2003, which authorizes the State Office of Administrative Hearings to conduct contested case hearings, Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures, and §2003.050, which requires SOAH to adopt rules governing the procedures, including discovery procedures, that relate to a hearing conducted by SOAH.

The repeals affect Government Codes, Chapters 2001 and 2003.

§155.1. Purpose and Scope.

§155.3. Application and Construction of this Chapter.

§155.5. Definitions.

§155.7. Jurisdiction.

§155.9. Request to Docket Case.

§155.11. Seal.

§155.13. Venue.

§155.15. Powers and Duties of Judges.

§155.17. Assignment of Judges to Cases.

§155.19. Computation of Time.

§155.21. Representation of Parties.

§155.23. Filing Documents or Serving Documents on the Judge.

§155.25. Service of Documents on Parties.

§155.27. Notice of Hearing.

§155.29. Pleadings.

§155.30. Motions.

§155.31. Discovery.

§155.33. Orders.

§155.35. Certification of Questions to Referring Agency.

§155.37. Settlement Conferences.

§155.39. Stipulations.

§155.41. Procedure at Hearing.

§155.43. Making a Record of Contested Case.

§155.45. Participation by Telephone or Videoconferencing.

§155.47. Public Attendance and Comment at Hearing.

§155.49. Conduct and Decorum.

§155.51. Evidence.

§155.53. Consideration of Policy Not Incorporated in Referring Agency's Rules.

§155.55. Default Proceedings.

§155.56. Dismissal Proceedings.

§155.57. Summary Disposition.

§155.59. Proposal for Decision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803127
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

CHAPTER 155. RULES OF PROCEDURE
SUBCHAPTER A. GENERAL

1 TAC §§155.1, 155.3, 155.5, 155.7, 155.9

The State Office of Administrative Hearings (SOAH) proposes new §§155.1, 155.3, 155.5, 155.7, and 155.9 comprising new Subchapter A, General. The new rules replace the current rules, which are being simultaneously repealed. In general, the new rules do not substantially change SOAH's existing rules. The new rules are being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter A, General, includes §§155.1, Purpose; 155.3, Application and Construction of this Chapter; 155.5, Definitions; 155.7, Computation of Time; and 155.9, Seal.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rules are in effect the public benefit anticipated as a result of the rules will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rules. There is no anticipated economic cost to individuals who are required to comply with the new rules.

Cathleen Parsley has further determined that the new rules are revisions of existing rules and do not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rules in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rules relate affect Government Code, Chapters 2001 and 2003.

§155.1. Purpose.

(a) This chapter governs the procedures of the State Office of Administrative Hearings (SOAH). These procedures apply in all matters referred to SOAH, including contested cases under the Administrative Procedure Act (APA), Tex. Gov't Code Chapter 2001. These procedures do not apply to matters otherwise addressed by statute or to matters that are otherwise limited by the provisions of this chapter.

(b) Administrative License Suspension cases initiated by the Texas Department of Public Safety are governed by Chapter 159 of this title (relating to Rules of Procedure for Administrative License Suspension Hearings).

(c) Arbitration procedures for certain enforcement actions of the Texas Department of Aging and Disability Services are governed by Chapter 163 of this title (relating to Arbitration Procedures for Certain Enforcement Actions of the Texas Department of Aging and Disability Services).

(d) SOAH adopts by reference the procedural rules of the Public Utility Commission of Texas (PUC) and the Texas Commission on Environmental Quality (TCEQ) that address the contested case process in matters referred by those agencies and that are not inconsistent with applicable law. This adoption does not include any PUC or TCEQ rules addressing the use of Alternative Dispute Resolution (ADR) processes at SOAH. Those ADR processes are governed by the Governmental Dispute Resolution Act, Tex. Gov't Code Chapter 2009; SOAH rule provisions pertaining to ADR; and interagency contracts, memoranda of understanding, or other written agreements with referring entities.

(e) Under Tex. Gov't Code §815.102, the procedural rules of the Employees Retirement System of Texas (ERS) govern the formal contested case process in matters it refers to SOAH.

§155.3. Application and Construction of this Chapter.

(a) SOAH proceedings shall be conducted in accordance with the APA, when applicable, and with this chapter. The judge may modify and supplement the requirements of this chapter to promote the fair

and efficient handling of the case and to facilitate resolution of issues, if doing so will not unduly prejudice the rights of any person or contravene applicable statutes.

(b) If there is any conflict between an agency's rules or prior decisions and statutory provisions applicable to the case, and the rules or decisions cannot be harmonized with the statute, the statute controls.

(c) The procedural rules of a state agency govern SOAH proceedings only to the extent that SOAH's rules adopt the agency's procedural rules by reference, unless otherwise required by law.

(d) If there is any conflict between SOAH's rules and the procedural rules of the TCEQ adopted in §155.1 of this title (relating to Purpose), the TCEQ rules will control.

(e) If there is any conflict between SOAH's rules and the procedural rules of the PUC adopted in §155.1 of this title (relating to Purpose), the PUC rules will control.

(f) If there is any conflict between SOAH's rules and the procedural rules of ERS referenced in §155.1 of this title (relating to Purpose), the ERS rules will control.

(g) This chapter shall be construed to ensure the just and expeditious determination of every matter referred to SOAH. Not all contested procedural issues will be susceptible to resolution by reference to the APA and other applicable statutes, this chapter, and case law. When they are not, the presiding judge will consider applicable policy of the referring agency documented in the record in accordance with §155.419 of this title (relating to Consideration of Policy Not Incorporated in Referring Agency's Rules), the Texas Rules of Civil Procedure as interpreted and construed by Texas case law, and persuasive authority established in other forums.

(h) Unless otherwise expressly provided, the past, present, and future tense shall each include the other; the masculine, feminine, and neuter gender shall each include the other; and the singular and plural number shall each include the other.

(i) Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. The principles of statutory construction and of the Code Construction Act, Tex. Gov't Code §311.001 *et seq.*, apply.

§155.5. Definitions.

When used in this chapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative law judge or judge--An individual appointed to serve as a presiding officer by SOAH's chief administrative law judge under Tex. Gov't Code Chapter 2003.

(2) Alternative Dispute Resolution or ADR--Processes used at SOAH to resolve disputes outside or in connection with contested cases including mediation, mini-trials, early neutral evaluation, and arbitration.

(3) APA--The Administrative Procedure Act, Tex. Gov't Code Chapter 2001.

(4) Arbitration--A form of ADR, governed by an agreement between the parties or special rules or statutes providing for the process, in which a third-party neutral issues a decision after a streamlined and simplified hearing. Arbitrations may be binding or non-binding, depending on the agreement, statutes, or rules. *See* Chapter 163 of this title (relating to Arbitration Procedures for Certain Enforcement Actions of the Texas Department of Aging and Disability Services) for procedural rules specifically governing the arbitration of certain nursing home enforcement cases referred by the Texas Department of Aging and Disability Services.

(5) Authorized representative--An attorney authorized to practice law in the State of Texas or, if authorized by applicable law, a person designated by a party to represent the party.

(6) Business day--A weekday on which state offices are open.

(7) Case--A dispute over which SOAH exercises jurisdiction to be resolved by a contested case proceeding or an ADR process.

(8) Chief Judge--The chief administrative law judge of SOAH.

(9) Contested case--A proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined after opportunity for an adjudicative hearing.

(10) Discovery--The process of compulsory disclosure by a party, upon another party's request, of information, including facts and documents, relating to the contested case.

(11) Evidence--Testimony and exhibits admitted into the record to prove or disprove the existence of an alleged fact.

(12) Exhibits--Documents, records, or other tangible objects offered by a party as evidence.

(13) Final decision--A decision on the merits that is issued by the judge after a contested case hearing or after a ruling on a motion for summary disposition and authorized by APA §2001.058 or other applicable law.

(14) Law--The United States and Texas Constitutions, state and federal statutes, rules and regulations, and relevant case law.

(15) Media or media agency--A person or organization regularly engaged in news gathering or reporting, including any newspaper, radio or television station or network, news service, magazine, trade paper, professional journal, or other news reporting or news gathering entity.

(16) Mediation--A confidential, informal dispute resolution process in which an impartial person, the mediator, facilitates communication among the parties to promote settlement, reconciliation, or understanding.

(17) Party--A person named or admitted to participate in a case before SOAH.

(18) Person--An individual, representative, corporation, or other entity, including any public or non-profit corporation, or any agency or instrumentality of federal, state, or local government.

(19) Pleading--A filed document that requests procedural or substantive relief, makes claims, alleges facts, makes legal argument, or otherwise addresses matters involved in the case.

(20) Proceeding--Any ADR process or any hearing in a contested case, including prehearing conferences, preliminary hearings, and hearings on the merits.

(21) PUC--The Public Utility Commission of Texas.

(22) Referring agency--A state board, commission, department, agency, or other governmental entity that refers a contested case or other dispute to SOAH.

(23) SOAH--The State Office of Administrative Hearings.

(24) Stipulation--An agreement among opposing parties concerning a relevant issue or fact.

(25) TCEQ--The Texas Commission on Environmental Quality.

(26) TRCP--The Texas Rules of Civil Procedure. The TRCP are found on the website of the Texas Supreme Court, www.supreme.courts.state.tx.us/rules and in the *Texas Rules of Court* published by Thomson/West.

(27) TRE--The Texas Rules of Evidence. The TRE are found on the website of the Texas Supreme Court, www.supreme.courts.state.tx.us/rules and in the *Texas Rules of Court* published by Thomson/West.

§155.7. Computation of Time.

(a) Application of rule. This rule applies unless another method is required by statute, another rule in this chapter, or order.

(b) Computing time periods. When computing periods of time prescribed or allowed in this chapter:

(1) the day of the act, event, or default from which the designated time period begins to run is not counted; and

(2) the last day of the time period is counted, unless it is a day on which SOAH's offices are closed, in which case the time period will end on the next day SOAH's offices are open.

(c) Calendar days. Time limits shall be computed using calendar days rather than business days except as provided by subsection (d) of this section.

(d) Five days or less. If the time limit is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted.

(e) Extensions of time. If a party seeks an extension of time, the judge may:

(1) grant the party's request upon a showing of good cause; and

(2) permit the act to be done after the expiration of the original time period.

§155.9. Seal.

SOAH may maintain a seal to authenticate its official acts, including certifying copies of the administrative records of any matters heard by SOAH. The seal shall have a star with five points and the words "State Office of Administrative Hearings" engraved upon it.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803128
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER B. DOCKETING--FILING A CONTESTED CASE

1 TAC §155.51, §155.53

The State Office of Administrative Hearings (SOAH) proposes; new §155.51 and §155.53 comprising new Subchapter B, Docketing--Filing a Contested Case. The new rules replace the current rules, which are being simultaneously repealed. In general, the new rules do not substantially change SOAH's existing rules. The new rules are being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter B, Docketing--Filing a Contested Case, includes §155.51, Jurisdiction, and §155.53, Request to Docket Case.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rules are in effect the public benefit anticipated as a result of the rules will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rules. There is no anticipated economic cost to individuals who are required to comply with the new rules.

Cathleen Parsley has further determined that the new rules are revisions of existing rules and do not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rules in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rules relate affect Government Code, Chapters 2001 and 2003.

§155.51. Jurisdiction.

(a) Acquisition of jurisdiction. SOAH acquires jurisdiction over a case when a referring agency completes and files a Request to Docket Case form and any documents described in §155.53 of this title (relating to Request to Docket Case). A separate Request to Docket Case form shall be completed and filed for each case referred to SOAH.

(b) When Request to Docket Case form is considered filed. A Request to Docket Case form shall be considered filed on the date the form is received by SOAH.

(c) Commencement of time periods. Any period of time established by these rules shall not begin to run until SOAH acquires jurisdiction over a case.

(d) Effect of acquisition of jurisdiction by SOAH. After SOAH acquires jurisdiction, any party may initiate discovery or move for appropriate relief, including evidentiary rulings, continuances, summary disposition, and setting of proceedings.

§155.53. Request to Docket Case.

(a) Documents to be filed with Request to Docket Case form. A referring agency shall file with SOAH a completed Request to Docket Case form and the complaint, petition, application, or other pertinent documents describing the agency action giving rise to the case.

(b) Actions to be requested. A referring agency shall request one of the following actions on the Request to Docket Case form:

(1) setting of a hearing;

(2) assignment of a judge; or

(3) an ADR process.

(c) Request for setting of hearing. If a referring agency requests a setting of hearing, SOAH will assign a judge and will provide the agency with the date, time, and place of the setting.

(d) Request for assignment of ALJ. If a referring agency requests assignment of a judge, SOAH will assign a judge to consider motions and other pre-hearing matters.

(e) Request for ADR. If a referring agency requests ADR, SOAH will advise the parties of:

(1) the mediator, arbitrator, or judge appointed; and

(2) the date, time, and place for the ADR.

(f) Refusal of Request to Docket Case form. SOAH may refuse to accept for filing any Request to Docket Case form that has not been properly referred to SOAH or that does not substantially conform to the filing procedures of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803129
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER C. FILING AND SERVICE OF DOCUMENTS

1 TAC §155.101, §155.103

The State Office of Administrative Hearings (SOAH) proposes new §155.101 and §155.103 comprising new Subchapter C, Filing and Service of Documents. The new rules replace the current rules, which are being simultaneously repealed. In general, the new rules do not substantially change SOAH's existing rules. The new rules are being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter C, Filing and Service of Documents, includes §155.101, Filing Documents, and §155.103, Service of Documents on Parties.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rules are in effect the public benefit anticipated as a result of the rules will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rules. There is no anticipated economic cost to individuals who are required to comply with the new rules.

Cathleen Parsley has further determined that the new rules are revisions of existing rules and do not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rules in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rules relate affect Government Code, Chapters 2001 and 2003.

§155.101. Filing Documents.

(a) Place for filing original materials.

(1) Contested cases generally.

(A) The original of all pleadings and other documents, except contested cases referred to SOAH by the PUC and the TCEQ, shall be filed with SOAH when it acquires jurisdiction.

(B) Pleadings and other documents to be filed with SOAH shall be mailed to P.O. Box 13025, Austin, Texas 78711-3025; hand delivered to 300 West 15th Street, Room 504; or faxed to (512) 475-4994. If the parties are notified that the case has been assigned to a judge in a field office outside Austin, pleadings and other documents shall be filed with the judge at the appropriate field office address.

(C) The time and date of filing shall be determined by the file stamp affixed by SOAH. Unless otherwise ordered by the judge, only one copy of any pleading or document shall be filed.

(2) Cases referred by the PUC.

(A) Except for exhibits offered at a prehearing conference or hearing, the original of all documents shall be filed at the PUC in accordance with the PUC rules.

(B) The party filing a document with the PUC (except documents provided in the discovery process that are not the subject of motions filed in a discovery dispute) shall serve the judge with a copy of the document by delivery to SOAH on the same day as the filing.

(C) The court reporter shall provide the transcript and exhibits to the judge at the same time the transcript is provided to the requesting party. SOAH shall maintain the transcript and exhibits until they are released to the PUC by the judge. If no court reporter was requested by a party, SOAH shall maintain the recording of the hearing and the exhibits until they are released to the PUC by the judge.

(3) Cases referred by the TCEQ.

(A) Except for exhibits offered at a prehearing conference or hearing, the original of all documents shall be filed with the TCEQ's Chief Clerk in accordance with the TCEQ rules.

(B) The time and date of filing these materials shall be determined by the file stamp affixed by the chief clerk, or as evidenced by the file stamp affixed to the document or envelope by the TCEQ mail room, whichever is earlier.

(C) The party filing a document with the TCEQ (except documents provided in the discovery process that are not the subject of motions filed in a discovery dispute) shall serve the judge with a copy of the document by delivery to SOAH on the same day as the filing.

(D) The court reporter shall provide the transcript and exhibits to the judge at the time the transcript is provided to the requesting party. SOAH shall maintain the transcript and exhibits until they are released to the TCEQ by the judge. If no court reporter was requested by a party, SOAH shall maintain the recording of the hearing and the exhibits until they are released to the TCEQ by the judge.

(b) Confidential materials.

(1) Filing of confidential materials generally. A party filing materials made confidential by law shall file them in a sealed and labeled container, accompanied by an explanatory cover letter. The cover letter shall identify the docket number and style of the case and shall explain the nature of the sealed materials. The outside of the container shall identify the docket number, style of the case, and name of the submitting party, and be marked "CONFIDENTIAL AND UNDER SEAL" in bold print at least one inch in size. Each page of the confidential material shall be marked "confidential."

(2) Materials submitted for *in camera* review. A party submitting materials for *in camera* review by the judge shall supply them to the judge in a sealed and labeled container, accompanied by an explanatory cover letter copied to all parties. The cover letter, addressed to the judge, shall identify the docket number, style of the case, explain the nature of the sealed materials, and specify the relief sought. The outside of the container, addressed to the judge, shall identify the docket number, style of the case, and name of the submitting party, and shall be marked "IN CAMERA REVIEW" in bold print at least one inch in size. Each page for which a privilege is asserted shall be marked "privileged." The judge will determine whether the materials will be received for filing by SOAH. Unless otherwise ordered by the judge, materials reviewed *in camera* will be returned to the party that submitted them.

(c) Discovery materials.

(1) Discovery requests and documents produced in discovery shall not be filed with SOAH, except as provided in paragraph (3) of this subsection.

(2) Documents produced in discovery shall be served upon the requesting parties and notice of service shall be given to all parties. The party responsible for service of the discovery materials shall retain an exact duplicate of the original documents.

(3) Motions and responses in a discovery dispute shall include only the relevant portions of the discovery materials.

(d) Facsimile materials.

(1) Filings made by facsimile transmission shall be no more than 35 pages.

(2) The quality of the original shall be sufficiently clear to transmit legibly.

(3) The first sheet shall indicate the number of pages being transmitted and shall contain a telephone number to call if there are transmission problems.

(4) Neither the original nor any additional copies of facsimile filings shall be filed with SOAH.

(5) The sender shall maintain the original of the document with the original signature.

(6) The date imprinted by SOAH's facsimile machine on the accompanying transaction report shall determine the filing date. Documents received when SOAH is closed shall be deemed filed the next business day.

§155.103. Service of Documents on Parties.

(a) Service on all parties. On the same date a document is filed, it shall also be served on each party or the party's authorized representative by hand-delivery; by regular, certified or registered mail; by electronic mail, upon agreement of the parties; or by facsimile transmission. By order, the judge may exempt a party from serving certain documents or materials upon all parties.

(b) Certificate of service. A person filing a document shall include a certificate of service that certifies compliance with this section.

(1) A form for a certificate of service shall be sufficient if it substantially complies with the following example: "Certificate of Service: I certify that on *date*, a true and correct copy of this *name of document* has been sent to *name of opposing party or authorized representative for the opposing party* by *specify method of delivery, e.g., regular mail, facsimile, certified mail*. *Signature*"

(2) If a filing does not certify service, SOAH may:

(A) return the filing;

(B) send notice of noncompliance to all parties, stating the filing will not be considered until all parties have been served; or

(C) send a copy of the filing to all parties.

(c) Presumed time of receipt of served documents. The following rebuttable presumptions shall apply regarding a party's receipt of documents served by another party:

(1) If a document was hand-delivered to a party, the judge shall presume that the document was received on the date of filing at SOAH.

(2) If a document was served by courier-receipted delivery, the judge shall presume that the document was received no later than the day after filing at SOAH.

(3) If a document was sent by regular, certified, or registered mail, the judge shall presume that it was received no later than three days after mailing.

(4) If a document was served by facsimile transmission or by electronic mail before 5:00 p.m. on a business day, the judge shall

presume that the document was received on that day; otherwise, the judge shall presume that the document was received on the next business day.

(d) Burden on sender. The sender has the burden of proving date and time of service.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803130
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER D. JUDGES

1 TAC §§155.151, 155.153, 155.155, 155.157

The State Office of Administrative Hearings (SOAH) proposes new §§155.151, 155.153, 155.155, and 155.157 comprising new Subchapter D, Judges. The new rules replace the current rules, which are being simultaneously repealed. In general, the new rules do not substantially change SOAH's existing rules. The new rules are being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter D, Judges, includes §§155.151, Assignment of Judges to Cases; 155.153, Powers and Duties; 155.155, Orders; and 155.157, Sanctioning Authority.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rules are in effect the public benefit anticipated as a result of the rules will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rules. There is no anticipated economic cost to individuals who are required to comply with the new rules.

Cathleen Parsley has further determined that the new rules are revisions of existing rules and do not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rules in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rules relate affect Government Code, Chapters 2001 and 2003.

§155.151. Assignment of Judges to Cases.

(a) Discretion of Chief Judge. Assignment of judges to cases is at the discretion of the Chief Judge and the Chief Judge's designees and is not subject to request except as provided by subsection (b) of this section.

(b) Disqualification or recusal. On motion of a party or on the judge's own action, a judge is subject to recusal or disqualification on the same grounds and under the same circumstances as specified in TRCP Rule 18b.

(1) Motion. A motion to recuse or disqualify a judge assigned to a case shall:

(A) be filed at the earliest practicable time;

(B) be verified;

(C) state with particularity the grounds for the motion; and

(D) be made on personal knowledge and include such facts as would be admissible in evidence, except that facts may be stated on information and belief if the basis for such belief is specifically stated.

(2) Response to motion. Any other party may file a statement opposing or concurring with a motion to recuse or disqualify.

(c) Judge's inability to continue presiding. If a judge is unable to continue presiding or to issue a proposal for decision after the conclusion of the hearing, the Chief Judge or the Chief Judge's designee may reassign the case to another judge. That judge shall review the existing record and need not repeat previous proceedings, but may conduct further proceedings as necessary.

(d) Assignment of more than one judge. More than one judge may be assigned to a case.

(1) If more than one judge is assigned to a case, the judges may divide their areas of responsibility.

(2) Evidentiary and procedural questions ordinarily will be resolved by the judge presiding at the time the issues arise, but may be referred to another judge assigned to the case.

(e) Temporary assignments. Cases may be temporarily assigned to a single judge or panel of judges to decide regularly occurring threshold issues.

§155.153. Powers and Duties.

(a) Judge's authority and duties. The judge shall have the authority and duty to:

(1) conduct a full, fair, and efficient hearing;

(2) take action to avoid unnecessary delay in the disposition of the proceeding;

(3) maintain order; and

(4) reopen the record when justice requires, if the judge has not issued a dismissal, proposal for decision, or final decision.

(b) Judge's powers. The judge shall have the power to regulate prehearing matters, the hearing, and the conduct of the parties and authorized representatives, including the power to:

(1) administer oaths;

(2) take testimony, including the power to question witnesses and to request the presence of a witness from a state agency, as contemplated by APA §2001.090(d);

(3) rule on questions of evidence;

(4) rule on discovery issues;

(5) issue orders relating to hearing and prehearing matters, including orders imposing sanctions;

(6) admit or deny party status;

(7) designate the party with the burden of proof pursuant to §155.427 of this title (relating to Burden of Proof);

(8) exclude irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations of evidence or argument;

(9) order parties to submit legal memoranda and proposed findings of fact and conclusions of law;

(10) issue proposals for decision pursuant to APA §2001.062, and when authorized, final decisions; and

(11) rule on motions for rehearing, when authorized.

§155.155. Orders.

(a) Judge's authority. The judge has authority to:

(1) issue orders to control the conduct and scope of the proceeding;

(2) rule on motions;

(3) establish deadlines;

(4) schedule and conduct prehearing or posthearing conferences;

(5) require the prefiling of exhibits and testimony;

(6) set out requirements for participation in the case; and

(7) take other steps conducive to a fair and efficient contested case process.

(b) Record of rulings. Rulings not made orally at a recorded prehearing conference or hearing shall be in writing and issued to all parties of record.

(c) Consolidation or joinder for hearing. The judge may order that cases be consolidated or joined for hearing if:

(1) there are common issues of law or fact; and

(2) consolidation or joint hearing will promote the fair and efficient handling of the matters.

(d) Severance of issues. The judge may order severance of issues if separate hearings on such issues will promote the fair and efficient handling of the matters.

(e) Referral to mediation. The judge may order referral of a case to mediation or other appropriate alternative dispute resolution procedure as provided by the Governmental Dispute Resolution Act; Tex. Gov't Code Chapter 2009; and the statute creating SOAH, Tex. Gov't Code Chapter 2003.

(f) Final decisions. Where authorized by law, the judge may issue a final decision resolving the contested issues in a case and ruling on all requests for relief.

§155.157. Sanctioning Authority.

(a) Authority to impose sanctions. For contested cases referred by an agency other than the PUC or the TCEQ, the judge has the authority to impose appropriate sanctions against a party or its representative for:

(1) filing a motion or pleading that is deemed by the judge to be groundless and brought:

(A) in bad faith;

(B) for the purpose of harassment; or

(C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(D) abuse of the discovery process in seeking, making, or resisting discovery; or

(E) failure to obey an order of the judge or a SOAH or referring agency rule.

(b) Sanctions that may be imposed. The judge may issue an order imposing sanctions when justified by party or representative behavior described in subsection (a) of this section and after notice and opportunity for hearing. Sanctions may include:

(1) disallowing or limiting further discovery by the offending party;

(2) charging all or part of the expenses of discovery against the offending party or its representatives;

(3) deeming designated facts be admitted for purposes of the proceeding;

(4) refusing to allow the offending party to support or oppose a claim or defense or prohibiting the party from introducing designated matters into the record;

(5) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; or

(6) striking pleadings or testimony in whole or in part.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803132
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

SUBCHAPTER E. REPRESENTATION OF PARTIES

1 TAC §155.201

The State Office of Administrative Hearings (SOAH) proposes new §155.201 comprising new Subchapter E, Representation of Parties. The new rule replaces the current rule, which is being simultaneously repealed. In general, the new rule does not

substantially change SOAH's existing rules. The new rule is being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter E, Representation of Parties, includes §155.201, Representation of Parties.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rule is in effect the public benefit anticipated as a result of the rule will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rule. There is no anticipated economic cost to individuals who are required to comply with the new rule.

Cathleen Parsley has further determined that the new rule is a revision of existing rules and does not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rule in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rule is proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rule relates affect Government Code, Chapters 2001 and 2003.

§155.201. Representation of Parties.

(a) Representation for individuals. An individual may represent himself or herself or may appear by authorized representative.

(b) Appearance by authorized representative. A party's authorized representative shall enter an appearance with SOAH that contains the representative's mailing address and telephone and facsimile numbers. If the party's representative is not licensed to practice law in Texas and the authority of the representative is challenged, the representative must show authority to appear as the party's representative.

(c) Nonresident attorney. An attorney who is a resident of and licensed to practice law in another state and who is not an active member of the State Bar of Texas shall comply with the requirements of Tex. Gov't Code §82.0361 and Rule XIX of the Rules Governing Admission to the Bar of Texas before entering an appearance on behalf of a party at SOAH. Rule XIX may be found at http://www.ble.state.tx.us/Rules/NewRules/rulebook_toc.htm.

(d) Attorney in charge. When more than one attorney makes an appearance on behalf of a party, the attorney whose signature first appears on the initial pleading for a party shall be the attorney in charge for that party unless another attorney is specifically designated in writing. Unless otherwise ordered by the judge, all communications sent by SOAH or other parties regarding the matter shall be sent to the attorney in charge.

(e) Motion to withdraw as counsel. The attorney of record or authorized representative seeking to withdraw shall file a motion to withdraw and shall provide in the motion a mailing address and telephone number for the party. If the party is to be represented by another attorney, the motion shall include the mailing address, telephone number, and any facsimile number of the substitute attorney. A party's attorney of record or authorized representative shall remain as such until a motion to withdraw is filed and granted by the judge.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803133
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER F. DISCOVERY

1 TAC §155.251

The State Office of Administrative Hearings (SOAH) proposes new §155.251 comprising new Subchapter F, Discovery. The new rule replaces the current rule, which is being simultaneously repealed. In general, the new rule does not substantially change SOAH's existing rules. The new rule is being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter F, Discovery, includes §155.251, Discovery.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rule is in effect the public benefit anticipated as a result of the rule will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rule. There is no anticipated economic cost to individuals who are required to comply with the new rule.

Cathleen Parsley has further determined that the new rule is a revision of existing rules and does not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rule in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hear-

ings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rule is proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rule relates affect Government Code, Chapters 2001 and 2003.

§155.251. Discovery.

(a) Commencement of discovery. Discovery may begin when SOAH acquires jurisdiction under §155.51 of this title (relating to Jurisdiction).

(b) Discovery rights. Parties have the discovery rights provided in this section, the APA, and the TRCP, except the provisions relating to the discovery control plans. Discovery rights may be modified or changed by the judge. For cases not adjudicated under the APA, the judge will determine what discovery, if any, will be permitted.

(c) Forms of discovery. Parties may use the forms of discovery provided by the TRCP, with the following modifications:

(1) Discovery period. Discovery responses and depositions must be completed by the tenth day before the hearing on the merits begins unless otherwise ordered by the judge or agreed by the parties. Discovery requests shall be submitted at least 30 days before the end of the discovery period.

(2) Copies. Copies of discovery requests and answers to those requests shall not be filed with SOAH unless directed by the judge, or in support of a motion to compel, motion for protective order, or motion to quash.

(3) Response. The judge may establish deadlines as necessary for discovery requests and responses. If the judge does not establish a deadline, responses to discovery requests, except for notices of depositions, shall be made within 20 days after receipt.

(4) Depositions.

(A) The APA governs the taking and use of depositions unless otherwise provided by law.

(B) Except with permission of the judge upon a showing of good cause or upon agreement by all parties, the following apply:

(i) All parties must receive at least seven days' notice of a deposition.

(ii) No party or side may examine or cross-examine an individual witness for more than six hours.

(iii) Brief breaks taken during the deposition do not count in the calculation of the period for a deposition.

(5) Requests for admissions. Unless the judge directs otherwise, each party may serve no more than 25 requests on any other party.

(6) Interrogatories. Each party may serve no more than two sets of interrogatories to any other party unless the judge directs otherwise. The number of questions, including subsections, in a set of interrogatories shall be limited to require no more than 25 answers.

(7) *In camera* inspections. If a party's objection to a discovery request is based on a claim of privilege or an exemption under the TRCP, and a motion to compel is timely filed, the burden is on the objecting party to request an *in camera* inspection and to provide the documents for review under seal. The request shall state the factual and legal bases that support the claimed privilege or exemption and shall comply with the provisions of §155.101(b)(2) of this title (relating to Filing Documents).

(d) Motions to compel. The party seeking discovery shall file a motion to compel within ten days of receipt of the pertinent objection or alleged failure to comply with discovery.

(e) Certificate of conference. The parties and their authorized representatives shall cooperate in discovery and shall endeavor to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions shall include a certificate of conference complying substantially with §155.305(b)(2) of this title (relating to Motions, Generally).

(f) Sealing records. The judge may order all or part of the record sealed in accordance with applicable law or rule or upon a showing of the following:

(1) a specific, serious, and substantial interest that clearly outweighs the presumption of openness that applies to SOAH's records;

(2) any probable adverse effect that sealing will have upon the public health or safety; and

(3) no less restrictive means than sealing the records will adequately and effectively protect the specific interest asserted.

(g) Subpoenas. Except in TCEQ and PUC cases, requests for issuance of subpoenas or commissions shall be directed to the referring agency. Any such requests shall comply with the APA and the applicable agency procedure, if any, regarding issuance of subpoenas or commissions. Disputes over whether a request complies with applicable law will be resolved by the judge. In TCEQ and PUC cases, a request shall be submitted in accordance with those agencies' rules.

(h) Confidentiality. Nothing in this section excuses compliance with law concerning the confidentiality of certain records, including medical or mental health records.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803134
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER G. PLEADINGS AND MOTIONS

1 TAC §§155.301, 155.303, 155.305, 155.307

The State Office of Administrative Hearings (SOAH) proposes new §§155.301, 155.303, 155.305, and 155.307 comprising new Subchapter G, Pleadings and Motions. The new rules replace the current rules, which are being simultaneously repealed. In general, the new rules do not substantially change SOAH's existing rules. The new rules are being proposed to clarify wording,

to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter G, Pleadings and Motions, includes §§155.301, Required Form of Pleadings; 155.303, Effect of Signing Pleadings; 155.305, Motions, Generally; and 155.307, Continuance.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rules are in effect the public benefit anticipated as a result of the rules will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rules. There is no anticipated economic cost to individuals who are required to comply with the new rules.

Cathleen Parsley has further determined that the new rules are revisions of existing rules and do not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rules in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rules relate affect Government Code, Chapters 2001 and 2003.

§155.301. Required Form of Pleadings.

(a) Content generally. Written requests for action in a contested case shall be typewritten or printed legibly on 8-1/2 x 11 inch paper and timely filed at SOAH. Photocopies are acceptable if copies are clear and legible. All filings shall contain or be accompanied by the following:

(1) the name of the party seeking action;

(2) the SOAH docket number;

(3) the parties to the case and their status as petitioner or respondent;

(4) a concise statement of the type of relief, action, or order desired by the pleader and identification of the specific reasons for and facts to support the action requested;

(5) a certificate of service, as required by §155.103(b) of this title (related to Service of Documents on Parties);

(6) any other matter required by statute or rule; and

(7) the signature of the submitting party or the party's authorized representative.

(b) Amendment or supplementation of pleadings. A party may amend or supplement its pleadings only by written filing. An amendment or supplementation that includes information material to the substance of the hearing, requests for relief, changes to the scope of the hearing, or other matters that unfairly surprise other parties may not be filed later than ten days before the date of the hearing except by agreement of all parties.

§155.303. Effect of Signing Pleadings.

The signatures of parties or authorized representatives constitute certification that they have read the pleading and that, to the best of their knowledge, information, and belief formed after reasonable inquiry, the pleading is neither groundless nor brought in bad faith.

§155.305. Motions, Generally.

(a) Purpose and effect of motions. To make any request, including a request to change a setting or obtain a ruling, order, or any other procedural relief from the judge, a party shall file a written motion. The motion shall describe specifically the action requested and the basis for the requested action. The mere filing of a motion that has not been ruled on by the judge, even if uncontested or agreed, does not serve to grant the motion or to change or extend any time limit or deadline established by statute, rule, or order, or operate to continue or delay any setting by SOAH or the judge.

(b) General requirements for motions. Except as provided in this section or chapter, all motions shall:

(1) be filed in writing no later than seven days before the date of the hearing; except, for good cause demonstrated in the motion, the judge may consider a motion filed after that time or presented orally at a hearing;

(2) include a certificate of conference that complies substantially with one of the following examples:

(A) Example one: "Certificate of Conference: I certify that I conferred with *name of other party or other party's authorized representative* on *date* about this motion. *Succinct statement of other party's position on the action sought and/or a statement that the parties negotiated in good faith but were unable to resolve their dispute before submitting it to the judge for resolution*. *Signature*"

(B) Example two: "Certificate of Conference: I certify that I made reasonable but unsuccessful attempts to confer with *name of other party or other party's authorized representative* on *date or dates* about this motion. *Succinctly describe these attempts*. *Signature*"

(3) include a reference in the motion's title to a request for a hearing on the motion if the moving party seeks a hearing; and

(4) if requesting an extension of an established deadline, include:

(A) a proposed date for the deadline; and

(B) a certificate of conference that complies substantially with one of the examples set out in paragraph (2) of this subsection.

(c) Responses to motions generally. Except as provided in this section or chapter, responses to motions described in subsection (b) of this section shall be in writing and filed on the earlier of:

(1) five days after receipt of the motion; or

(2) the date and time of the hearing; however, if the judge finds a good reason has been shown, late-filed responses to written motions may be presented orally at hearing.

(d) Motions to intervene or for party status. Motions for party status shall be filed no later than 20 days prior to the date the case is set for hearing. Responses to such motions shall be filed no later than seven days after the motion is served on other parties.

(e) Other motions. Motions to reopen the record under §155.153(a)(4) of this title (relating to Powers and Duties), to compel and for protective orders under §155.251 of this title (relating to Discovery), to set aside a default under §155.501(d) of this title (relating to Default Proceedings), to set aside a dismissal for failure to prosecute under §155.503(a) of this title (relating to Dismissal Proceedings), and for summary disposition under §155.505 (relating to Summary Disposition), shall be governed by the referenced sections.

§155.307. Continuance.

(a) Contents. Motions for continuance shall include:

(1) a statement of the number of motions for continuance previously filed in the case by each party;

(2) the specific reason for the continuance;

(3) at least three proposed dates for the rescheduled hearing, or a deadline by which the movant will confer with the non-moving parties to submit three agreed proposed dates; and

(4) a certificate of conference that complies substantially with one of the examples set out in §155.305(b)(2) of this title (relating to Motions, Generally).

(b) Date of filing. Motions for continuance shall be filed no later than five days before the date of the hearing, except, if the judge finds a good reason has been demonstrated, the judge may consider a motion filed after that time or presented orally at the hearing.

(c) Date of service. Motions for continuance shall be served in accordance with §155.305(b) of this title (relating to Motions, Generally). However, a motion for continuance that is filed five days or less before the date of the hearing shall be served:

(1) by personal or facsimile delivery on the same day it is filed with SOAH, if feasible; or

(2) if same-day service is not feasible, by overnight delivery on the next business day.

(d) Responses to written motions for continuance. Responses to written motions for continuance shall be in writing, except a response to a written motion for continuance filed on the date of the hearing may be presented orally at the hearing. Responses to motions for continuance shall be filed on the earlier of:

(1) three days after receipt of the motion; or

(2) the date and time of the hearing.

(e) Consequences of failure to appear when a motion for continuance has not been ruled on. A case is subject to default or dismissal for a party's failure to appear at a scheduled hearing in which a motion for continuance has not been ruled on by the judge, even when the motion is agreed or unopposed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803135

Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 4931

♦ ♦ ♦

SUBCHAPTER H. MEDIATION

1 TAC §155.351

The State Office of Administrative Hearings (SOAH) proposes new §155.351 comprising new Subchapter H, Mediation. The new rule replaces the current rules, which are being simultaneously repealed. In general, the new rule does not substantially change SOAH's existing rules. The new rule is being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter H, Mediation, includes §155.351, Mediation.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rule is in effect the public benefit anticipated as a result of the rule will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rule. There is no anticipated economic cost to individuals who are required to comply with the new rule.

Cathleen Parsley has further determined that the new rule is a revision of existing rules and does not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rules in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rule is proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rule relates affect Government Code, Chapters 2001 and 2003.

§155.351. Mediation.

(a) Requesting mediation.

(1) A party may request mediation in writing, or orally during a prehearing conference or hearing.

(2) A motion for mediation must be based on a good faith belief that the parties may be able to resolve all or a portion of their dispute in mediation.

(3) A party may object to the proposed request for mediation orally or in writing.

(4) Mediation may not be used as a delay or discovery tactic.

(5) Mediation does not stay an existing procedural schedule unless ordered by the presiding judge.

(6) A judge may refer a case to mediation without agreement of the parties.

(b) Evaluation.

(1) A party may request, or the judge may order, that a mediator evaluate whether a case is appropriate for mediation.

(2) The mediator evaluating the case may conduct confidential, *ex parte* communications with the parties during the course of the evaluation.

(3) The mediator will make a written recommendation to the judge. The written recommendation will be served on all parties.

(c) Referral to mediation.

(1) If a request for mediation is granted, the judge will refer the case to SOAH's ADR Team Leader for assignment of a mediator, unless the parties have notified the judge that they intend to retain and pay a private mediator qualified in accordance with Tex. Civ. Prac. & Rem. Code Chapter 154.

(2) The referral order may include requirements to facilitate the mediation.

(d) Assignment of SOAH mediators.

(1) SOAH's ADR Team Leader will assign a qualified judge or judges to serve as mediator or co-mediators.

(2) If either party promptly and with good cause objects to an appointed mediator, SOAH will appoint another qualified judge to serve as mediator.

(3) The appointed mediator will not serve as presiding judge in the case.

(e) Use of non-SOAH mediators.

(1) Parties who agree to retain a non-SOAH qualified private mediator shall notify the presiding judge within ten days of the mediator's retention.

(A) The notice must include the name, address, and telephone number of the non-SOAH mediator selected; a statement that the parties have entered into an agreement with the mediator regarding the mediator's rate and method of compensation; and an affirmation that the mediator is qualified to serve according to Tex. Civ. Prac. & Rem. Code Chapter 154.

(B) The judge shall issue an order specifying the date by which the mediation must be completed.

(2) When a judge refers a TCEQ case to mediation, the mediation will be conducted by a TCEQ mediator unless a party or TCEQ's Senior Mediator requests that SOAH conduct the mediation. TCEQ enforcement cases shall not be referred to mediation except on request of the Executive Director's representative.

(f) Confidentiality of mediation.

(1) All communications in a mediation are confidential and subject to the provisions of the Governmental Dispute Resolution Act, Tex. Gov't Code §2009.054 and Tex. R. Evid. 408.

(2) The mediator shall not communicate about the mediation with the presiding judge except to disclose in a written report, copied to all parties, whether the parties attended the mediation, whether the matter settled, and any other stipulations or matters the parties agree to be reported.

(3) The mediator shall not be required to testify about communications that occur in a mediation or to produce documents submitted to the mediator.

(g) Agreements reached in mediation.

(1) Agreements reached by the parties in mediation shall be reduced to writing and signed by the parties before the end of the mediation, if possible.

(2) Whether an agreement signed by a governmental entity is subject to disclosure shall be determined in accordance with applicable law.

(h) Limits on mediator's authority.

(1) A mediator has no authority to order the parties to settle their dispute.

(2) A mediator has no authority to issue orders in a case referred to mediation. Deadlines in the case may be extended only by order of the presiding judge.

(i) This section does not limit the parties' ability to settle cases without mediation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803136
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER I. HEARINGS AND PREHEARINGS

1 TAC §§155.401, 155.403, 155.405, 155.407, 155.409, 155.411, 155.413, 155.415, 155.417, 155.419, 155.421, 155.423, 155.425, 155.427, 155.429, 155.431

The State Office of Administrative Hearings (SOAH) proposes new §§155.401, 155.403, 155.405, 155.407, 155.409, 155.411, 155.413, 155.415, 155.417, 155.419, 155.421, 155.423, 155.425, 155.427, 155.429, and 155.431 comprising new Subchapter I, Hearings and Prehearings. The new rules replace the current rules, which are being simultaneously repealed. In general, the new rules do not substantially change SOAH's existing rules. The new rules are being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter I, Hearings and Prehearings, includes §§155.401, Notice of Hearing; 155.403, Venue; 155.405, Participation by Telephone or Videoconference; 155.407, Interpreters; 155.409, Public Attendance and Comment; 155.411, Media Coverage; 155.413, Redaction of Documents; 155.415, Party Agreements; 155.417, Stipulations; 155.419, Consideration of Policy Not Incorporated in Referring Agency's Rules; 155.421, Certification of Questions; 155.423, Making a Record of the Proceeding; 155.425, Procedure at Hearing; 155.427, Burden of Proof; 155.429, Evidence; and 155.431, Conduct and Decorum.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rules are in effect the public benefit anticipated as a result of the rules will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rules. There is no anticipated economic cost to individuals who are required to comply with the new rules.

Cathleen Parsley has further determined that the new rules are revisions of existing rules and do not impose new or additional requirements on small businesses in Texas. Nonresident attorneys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rules in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rules relate affect Government Code, Chapters 2001 and 2003.

§155.401. Notice of Hearing.

(a) Notice of hearing. A referring agency shall provide notice of hearing to all parties in accordance with APA §2001.052 and shall include a specific citation to Chapter 155 of this title unless applicable law provides otherwise.

(b) Judge's orders. A judge may issue orders regarding the date, time, and place for hearing, and orders affecting the scope of the proceeding.

(c) Sufficiency of initial notice of hearing. A notice of rescheduling of a hearing will not affect the sufficiency of an initial notice of hearing provided by an agency under subsection (a) of this section.

§155.403. Venue.

(a) Neutral hearing site. SOAH will designate a neutral hearing site in accordance with applicable law.

(b) Factors judge may consider. In designating a hearing site not in Austin, the judge may consider the following factors:

(1) the amount in controversy;

(2) the number of persons in the geographical region affected by the outcome of the hearing;

(3) the estimated length of the hearing;

(4) the availability of hearing facilities;

(5) the costs to and preferences of the parties;

(6) the location of witnesses;

(7) the availability and feasibility of videoconference technology as a means to reduce costs to SOAH and the parties;

(8) legislative restrictions on travel; and

(9) any applicable law or other factor relevant to the fair and expeditious resolution of the case.

§155.405. Participation by Telephone or Videoconference.

(a) Request to appear by telephone. A party may request to appear or present testimony by telephone or to present the testimony of a witness by telephone.

(1) To appear or present testimony by telephone, a party must file a motion no later than ten days before the proceeding unless a different time period is allowed by the judge.

(2) A motion shall include at least the following:

(A) the reason for the request;

(B) the telephone number at which the party or witness may be reached at the time of the proceeding;

(C) a statement that the party or witness will be the same person who will appear by telephone at the proceeding; and

(D) a certificate of conference complying with §155.305(b)(2) of this title (relating to Motions, Generally).

(3) A timely, unopposed motion will be deemed granted without the necessity of an order, unless denied by order.

(b) Request to appear by videoconference. A party may request to appear or present the testimony of a witness by videoconference.

(1) To appear or present testimony by videoconference, a party must file a motion no later than ten days before the proceeding.

(2) A motion shall include a statement of the reason for the request and the city in which the party or witness will be located at the time of the proceeding.

(c) Hearings and prehearing conferences by telephone or videoconference. The judge may conduct hearings and prehearing conferences by telephone or videoconference upon notice to the parties, even in the absence of a motion.

(d) Substantive and procedural rights. All substantive and procedural rights apply to telephone and videoconference proceedings, subject only to the limitations of the physical arrangement.

(e) Documentary evidence. Documentary evidence to be offered at a telephone or videoconference proceeding shall be served on all parties and filed with SOAH at least three days before the proceeding unless the judge orders otherwise.

(f) Failure to appear at telephone or videoconference proceeding. For a telephone or videoconference proceeding, the following may be considered a failure to appear and grounds for default if the conditions exist for more than ten minutes after the scheduled time for the proceeding:

(1) failure to answer the telephone or videoconference line;

(2) failure to free the line for the proceeding; or

(3) failure to be ready to proceed.

§155.407. Interpreters.

A party or witness who needs an interpreter or translator in order to participate in a proceeding shall file a written request at least seven days before the setting. SOAH shall provide and pay for the following:

(1) an interpreter for hearing-impaired parties and witnesses, in accordance with §2001.055 of the APA;

(2) reader services or other communication services for visually-impaired parties and witnesses; and

(3) a certified language interpreter.

§155.409. Public Attendance and Comment.

(a) Proceedings open to public. Unless prohibited by law, all SOAH proceedings are open to the public.

(b) Removal of persons from proceeding. The judge retains the authority to remove persons whose conduct impedes the orderly progress of the proceeding and to take necessary steps to limit attendance due to any physical limitations of the hearing facility.

(c) Public comment. When authorized by statute, members of the public shall be allowed to make public comment addressing matters pertinent to the issues in the case. Unless provided by law, public comment is not part of the evidentiary record of the case.

§155.411. Media Coverage.

(a) When coverage is permitted. Proceedings that are open to the public may be broadcast, televised, recorded, or photographed unobtrusively and in a manner that does not interfere with the orderly conduct of the proceeding.

(b) When coverage is prohibited.

(1) Media coverage of proceedings closed to the public is prohibited.

(2) Media coverage of conferences between an attorney and client, witness, or aide, or between attorneys is prohibited.

(c) Authority of presiding judge.

(1) The judge may deny, limit, or terminate media coverage that is obtrusive or interferes with the orderly conduct of the proceeding.

(2) No proceeding will be delayed or continued for the sole purpose of allowing media coverage.

(d) Equipment and personnel. The judge may specify the placement of media personnel and equipment to permit reasonable coverage without disruption to the proceeding. Unless the judge orders otherwise, the following standards apply to the placement and operation of media equipment:

(1) If media coverage is sought by more than one person or entity, the judge may require a pool system to be used. It will be the responsibility of the media to resolve any disputes among themselves as to which personnel will operate equipment in the hearing room.

(2) Equipment shall not produce distracting sound or light. Moving lights, flash attachments, or sudden lighting changes shall not be used.

(3) Operators shall not move equipment while the hearing is in session or otherwise cause a distraction. All equipment shall be in place in advance of the commencement of the proceeding.

(4) Media personnel operating outside the hearing room shall not create a distraction and shall withdraw whenever necessary to avoid restricting movement of persons passing through the hearing room door.

§155.413. Redaction of Documents.

(a) Redaction of personal identifiers. A person who files a document at SOAH shall redact from the document all personal identifiers that are:

(1) protected by law from disclosure; or

(2) unnecessary for resolution of the case. At the time of filing, SOAH personnel will not be responsible for screening documents for compliance with this rule.

(b) Personal identifiers. "Personal identifiers" shall include: Social Security numbers, taxpayer identification numbers, full names of minors, full names of persons who are patients or clients in a health care setting, full names of persons who are victims of crimes, addresses and telephone numbers of commissioned peace officers, expunged criminal records, or records subject to a non-disclosure order issued by a court of this state unless allowed by law.

(c) Protective measures. If the judge determines that personal identifiers are necessary to the resolution of the case, the judge may admit the information into the record under seal or employ appropriate protective measures.

(d) Return to party for redaction. If the judge determines that the personal identifiers are not necessary to the resolution of the case, the judge may order the documents redacted prior to their admission into the record.

§155.415. Party Agreements.

Unless otherwise provided in this chapter, no agreement between attorneys or parties regarding a contested case pending before SOAH will be enforced unless it is in writing, signed, and filed with SOAH or entered on the record at the hearing or prehearing conference.

§155.417. Stipulations.

(a) Generally. Subject to the judge's approval, the parties may stipulate to any factual, legal, or procedural matters.

(b) Record of stipulations. A stipulation must be filed in writing or stated on the record.

§155.419. Consideration of Policy Not Incorporated in Referring Agency's Rules.

(a) Agency policy. Any party relying on a specific agency policy not incorporated in a rule has the burden of authenticating the policy and showing it to be applicable to a factual or legal issue in the case.

(b) Judge's consideration of agency policy. In resolving contested issues, the judge shall consider any applicable agency policy not incorporated in the agency's rules that is supported by the evidence. The judge's decision or recommendation on whether to apply an agency's policy will depend upon the nature and context of the policy and any request to apply it, and other factors such as:

(1) the extent to which the parties were given notice of the policy, including whether:

(A) the policy was made available through a generally accessible internet site as provided in Tex. Gov't Code §2001.007(a);

(B) the parties had adequate opportunity to address it in the presentation of their cases and arguments; and

(C) any party opposes application of the policy in the case.

(2) the specificity of the policy statement and the relative certainty of its applicability to the case;

(3) the stability and duration of the policy, as illustrated by the type of process that led to its adoption (including whether it was published in the *Texas Register*), the frequency and consistency with which it has been previously applied, and the level of formality of the process required for the agency to amend it;

(4) the highest level within the agency at which the policy has been adopted or ratified;

(5) whether the policy is a substantive principle coming within the agency's subject matter expertise and jurisdiction or pertains more to contested case procedure and practice; and

(6) whether application of the policy would violate applicable constitutional or statutory provisions or would be inconsistent with applicable decisions by Texas courts.

§155.421. Certification of Questions.

In cases referred by the PUC and the TCEQ, a party may move to certify an issue to the respective commission. A judge may also certify an issue without a motion. Certified questions are governed by the rules of the PUC and the TCEQ.

§155.423. Making a Record of the Proceeding.

(a) Record of proceedings. A record will be made of all contested case proceedings. At the judge's discretion, the making of a record of a prehearing conference may be waived. The actions taken at the prehearing conference may instead be reflected in a written order.

(b) Court reporters. Unless otherwise ordered by the judge, the referring agency shall provide a court reporter for any proceeding set to last longer than one day.

(c) SOAH's responsibility. For any proceeding in a docket set to last no longer than one day, SOAH is responsible for making a recording of the proceeding unless otherwise ordered by the judge.

(d) Official record. The recording made by SOAH under subsection (c) of this section or the transcript prepared under subsection (e) of this section is the official record of the proceeding for purposes of all actions within SOAH's jurisdiction. The judge may order a different means of making a record and may designate that record as the official record of the proceeding.

(e) Transcripts. The court reporter shall make a stenographic record of the proceeding but shall prepare a transcript only on the request of a party or the judge. If a proceeding lasts longer than one day, the judge may order that a transcript be prepared. Costs of a transcript ordered by any party ordinarily shall be paid by that party. If SOAH has recorded the proceeding, the referring agency shall inform SOAH of the need to deliver a copy of the original recording to a court reporter.

(1) The original transcript shall be filed with SOAH.

(2) The transcript prepared according to these procedures becomes the official record of the proceedings for purposes of all actions within SOAH's jurisdiction.

(3) Proposed written corrections of purported transcript errors must be filed with SOAH and served on the parties and the court reporter before issuance of the proposal for decision or final decision. The judge may establish deadlines for the filing of proposed corrections and responses. The transcript will be corrected only upon order of the judge.

(f) Maintenance of exhibits and official record. The judge shall maintain all exhibits admitted during the proceeding and the official record of the proceeding.

(1) The judge may allow the court reporter to retain the exhibits and the recording of the proceeding, if applicable, while a transcript is being prepared.

(2) The judge may retain the exhibits and transcript or recording to prepare for presentation of the proposal for decision to the referring agency. SOAH will send the exhibits and transcript or recording to the referring agency no later than after:

(A) the judge has issued the final decision;

(B) the judge has issued the proposal for decision and the deadline for filing exceptions and replies has passed.

§155.425. Procedure at Hearing.

(a) Control of the hearing. The judge shall exercise reasonable control over the mode and order of presenting preliminary matters, pending motions, opening statements, witness testimony and other evidence, oral or written closing argument, and other processes in the hearing.

(b) Designation of order of parties' presentations. The judge will designate the order in which the parties will present evidence and argument. Generally, the party with the burden of proof will present evidence first and will open and conclude oral argument. The judge shall designate the party with the burden of proof in accordance with §155.427 of this title (relating to Burden of Proof).

§155.427. Burden of Proof.

In determining which party bears the burden of proof, the judge shall first consider the applicable statute, the referring agency's rules, and the referring agency's policy in accordance with §155.419 of this title (relating to Consideration of Policy Not Incorporated in Referring Agency's Rules). After considering those sources, the judge may consider additional factors, including:

(1) the status of the parties;

(2) the parties' relative access to and control over information pertinent to the merits of the case;

(3) the party seeking affirmative relief;

(4) the party seeking to change the status quo; and

(5) whether a party would be required to prove a negative.

§155.429. Evidence.

(a) Rules of evidence.

(1) The Texas Rules of Evidence as applied in a nonjury civil case in district court govern contested case hearings conducted by SOAH.

(2) Evidence may be admitted if it meets the standards set out in Tex. Gov't Code §2001.081.

(b) Physical evidence: Exhibits.

(1) Paper size. Documents shall not be submitted on paper other than 8-1/2 x 11 inches unless good cause is shown that the documents cannot be reduced without loss of information.

(2) Numbering of pages. Any multipage document shall be paginated.

(3) Physical limits.

(A) Exhibits offered as evidence must not unduly encumber the records of SOAH by their size or other qualities.

(B) Physical evidence that is bulky, dangerous, perishable, or otherwise not suitable for inclusion in agency records shall not be offered into the record.

(C) A party seeking to admit an exhibit contrary to this section must make reasonable efforts to use photographs, recordings, or other mechanical or electronic means to substitute for physical evidence that would encumber SOAH's records.

(D) Maps, drawings, blueprints, and other documents not reasonably susceptible to reduction shall be rolled or folded to avoid physically encumbering the record.

(4) Numbering of exhibits.

(A) Each exhibit to be offered shall first be numbered by the offering party or court reporter.

(B) Copies of the original exhibit shall be furnished by the party offering the exhibit to the presiding judge and to each party present at the hearing unless otherwise ordered by the judge.

(5) Excluded exhibits. An exhibit excluded from evidence will be considered withdrawn by the offering party and will be returned to the party, unless the party makes an offer of proof in accordance with the Texas Rules of Evidence.

(6) Non-conforming exhibits. The judge may exclude exhibits not conforming to this section.

(c) Testimonial evidence.

(1) Prefiled testimony.

(A) The judge may require that exhibits and testimony of witnesses to be called at hearing be submitted in writing, filed prior to hearing, and served on other parties.

(B) The judge may require that objections to exhibits and objections to testimony of witnesses to be called at hearing be submitted in writing, filed prior to hearing, and served on other parties.

(C) A party may object to the prefiling of exhibits, testimony, and objections if the hearing will not be expedited and the interests of the parties will be substantially prejudiced by the entry of an order under this section.

(2) Exclusion of witnesses.

(A) At the request of either party or by the judge's own action, the judge may:

(i) order witnesses excluded from the hearing room so that they may not hear the proceedings;

(ii) instruct the witnesses not to converse about the case with each other or any person other than the attorneys in the proceeding except by permission of the judge; and

(iii) instruct the witnesses not to read any report of, or comment upon, the testimony in the case while under order of this section.

(B) This section does not authorize the exclusion of:

(i) a party who is a natural person or the spouse of such natural person;

(ii) an officer or employee of a party that is not a natural person and who is designated by the party as its representative;

(iii) a person whose presence is shown by a party to be essential to the presentation of the party's case.

§155.431. Conduct and Decorum.

(a) Standards of conduct. Parties, representatives, and other participants shall conduct themselves with dignity, show courtesy and respect for one another and for the judge, follow any additional guidelines of decorum prescribed by the judge, and adhere to the time schedule. Attorneys shall adhere to the standards of conduct in the Texas Lawyers' Creed promulgated by the Texas Supreme Court.

(b) Judge's authority. To maintain and enforce proper conduct and decorum, the judge may take appropriate action, including:

(1) issuing a warning;

(2) excluding persons from the proceeding; and

(3) recessing the proceeding.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803137
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER J. DISPOSITION OF CASE

1 TAC §§155.501, 155.503, 155.505, 155.507

The State Office of Administrative Hearings (SOAH) proposes and new §§155.501, 155.503, 155.505, and 155.507 comprising new Subchapter J, Disposition of Case. The new rules replace the current rules, which are being simultaneously repealed. In general, the new rules do not substantially change SOAH's existing rules. The new rules are being proposed to clarify wording, to delete unnecessary language, and to provide better and more helpful organization.

New Subchapter J, Disposition of Case, includes §§155.501, Default Proceedings; 155.503, Dismissal Proceedings; 155.505, Summary Disposition; and 155.507, Proposal for Decision.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Cathleen Parsley, General Counsel, also has determined that for the first five-year period the new rules are in effect the public benefit anticipated as a result of the rules will be to ensure more efficient and fair procedures for participants in contested case hearings. There will be no effect on small businesses as a result of enforcing the rules. There is no anticipated economic cost to individuals who are required to comply with the new rules.

Cathleen Parsley has further determined that the new rules are revisions of existing rules and do not impose new or additional requirements on small businesses in Texas. Nonresident attor-

neys who wish to appear before SOAH will be required to comply with the Rules Governing Admission to the Bar of Texas and pay a fee to the Board of Law Examiners. SOAH cannot determine how many out-of-state small law firms may be affected by the requirement but notes that appearances by nonresident attorneys in its hearings are infrequent.

Written comments must be submitted within 30 days after publication of the proposed new rules in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which authorizes the State Office of Administrative Hearings to conduct contested case hearings and requires adoption of procedural rules for hearings, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The provisions to which the proposed new rules relate affect Government Code, Chapters 2001 and 2003.

§155.501. Default Proceedings.

(a) Default. If a party to whom a notice of hearing is provided or served under this section fails to appear for hearing, the judge may proceed in that party's absence on a default basis. In the proposal for decision or final decision, the factual allegations listed in the notice of hearing will be deemed admitted. Failure to allege sufficient facts to support a default will result in denial of the relief sought.

(b) Proof to support default. Any default proceeding under this section requires adequate proof of the following:

(1) proper notice was provided to the defaulting party under Tex. Gov't Code Chapter 2001 and §155.401 of this title (relating to Notice of Hearing); and

(2) the notice included a disclosure in at least 12-point, bold-face type that the factual allegations listed in the notice could be deemed admitted, and the relief sought in the notice of hearing might be granted by default against the party that fails to appear at hearing.

(c) Alternative showing of notice. In the alternative, when it is not possible to prove actual receipt of notice, a hearing may proceed on a default basis if:

(1) the referring agency's statute or rules authorize service of the notice of hearing by sending it to the party's last known address as shown by the referring agency's records; and

(2) there is credible evidence that the notice of hearing was sent by first class or certified mail to such address.

(d) Motion to set aside default. A party may file a motion no later than ten days after the hearing to set aside a default and to reopen the record if a proposal for decision or a final decision has not been issued. The judge may grant the motion, set aside the default, and reopen the hearing for good cause shown.

(e) Judge's authority.

(1) If a party fails to appear at the hearing, the judge may:

(A) grant a continuance or dismissal from SOAH's docket to allow the referring agency to dispose of the case on a default basis under Tex. Gov't Code §2001.056 and the referring agency's rules; or

(B) issue a default proposal for decision or final decision.

(2) The judge has the authority to determine whether proper and adequate notice under Tex. Gov't Code Chapter 2001 and §155.401 of this title (relating to Notice of Hearing) was given.

§155.503. Dismissal Proceedings.

(a) Failure to prosecute.

(1) A contested case may be dismissed in whole or in part for want of prosecution if the party seeking affirmative relief or the party requesting the hearing:

(A) fails to appear for any hearing of which the party had notice; or

(B) fails to prosecute the case in accordance with a requirement of statute, rule, or order of the judge.

(2) Dismissal under this section removes the case from the SOAH docket without a decision on the merits.

(3) The judge may issue a conditional order of dismissal that:

(A) explains the party's failure to prosecute;

(B) informs the party of an opportunity to contest the dismissal; and

(C) states the order of dismissal will become final unless:

(i) the party files a motion to retain the case on the docket not later than 20 days after the order is signed; and

(ii) the motion to retain specifies the bases for the motion.

(4) The judge may grant a motion to retain if the moving party shows good cause for failure to prosecute.

(b) Other Dismissal Actions.

(1) The judge may dismiss a case or a portion of the case from SOAH's docket for:

(A) lack of jurisdiction over the matter by the referring agency;

(B) lack of statute, rule, or contract authorizing SOAH to conduct the proceeding;

(C) mootness of the case;

(D) failure to state a claim for which relief can be granted; or

(E) unnecessary duplication of proceedings.

(2) The judge may issue an order in response to a party's motion or after the judge notifies the parties of an intent to dismiss a case and allows time for responses.

(c) Dismissal from SOAH's docket.

(1) A judge may dismiss a matter from SOAH's docket with or without prejudice if a moving party withdraws its entire claim or the parties settle all matters in controversy.

(2) A judge may order withdrawn or settled matters severed before dismissing them if other related matters in the docket remain in controversy.

§155.505. Summary Disposition.

(a) Final decision or proposal for decision on summary disposition. The judge may issue a final decision or a proposal for decision on all or part of a contested case without an evidentiary hearing. The evidence must show that there is no genuine issue as to any material fact and that a party is entitled to a decision in its favor as a matter of law.

(b) Motions: deadlines, content, and format.

(1) A motion for summary disposition must be filed at least 30 days before the hearing on the merits unless otherwise ordered by the judge.

(2) A motion shall include a separate statement that sets forth plainly and concisely all material facts that the moving party contends are undisputed.

(3) Each of the material facts stated to be undisputed shall be followed by a clear and specific reference to the supporting evidence.

(4) A party's failure to comply with these requirements may constitute sufficient grounds for denial of the motion.

(c) Motions: summary disposition evidence.

(1) A party's motion for summary disposition may be based on an opposing party's pleadings, affidavits, materials obtained by discovery, matters officially noticed, stipulations, authenticated or certified public, business, or medical records, or other admissible evidence.

(2) Relevant portions of materials obtained by discovery may be relied upon to support or oppose a motion for summary disposition if:

(A) copies are filed with the motion or response; and

(B) a notice containing specific reference to the materials is served on all parties.

(d) Responses to motions: deadlines, content, and format.

(1) A response to a motion shall be filed within 14 days of receipt of the motion.

(2) The response shall include a separate statement that:

(A) addresses each of the material facts contended by the moving party to be undisputed; and

(B) indicates whether the responding party agrees or disagrees that the facts are undisputed.

(3) The response shall set forth plainly and concisely any other material facts that the responding party contends are disputed.

(4) Each of the material facts claimed by the responding party to be disputed shall be followed by a clear and specific reference to the supporting evidence.

(5) The response shall also include objections to the form of the motion and to the evidence.

(e) Movant's reply to response.

(1) The movant's reply to the response shall be filed within seven days of receipt of the response.

(2) The reply shall include objections to the form of the response and to the evidence.

§155.507. Proposal for Decision.

(a) Proposal for decision. For contested cases in which the judge does not have authority to issue a final decision, the judge shall prepare a proposal for decision.

(b) Submission of the proposal for decision. The judge shall submit the proposal for decision to the referring agency and furnish a copy to each party.

(c) Exceptions and replies. The parties may submit to the judge and the referring agency exceptions to the proposal for decision and replies to exceptions to the proposal for decision.

(1) Unless the referring agency's rules apply by statute, exceptions shall be filed within 15 days after the date of service of the proposal for decision. A reply to the exceptions shall be filed within 15 days of the filing of the exceptions.

(2) If the proposal for decision was served by hand delivery or by facsimile, the date of service shall be presumed to be the date of delivery. If the proposal for decision was served by regular mail, interagency mail, certified mail, or registered mail, the date of service shall be presumed to be no later than three days after mailing.

(3) The judge may extend or shorten the time to file exceptions or replies.

(4) The parties shall file with SOAH any motions for extension of time to file exceptions and replies. Parties' motions for extensions of time shall be filed no later than five days before the applicable deadline for submission of exceptions or replies and shall demonstrate either:

(A) good cause for the requested extension; or

(B) agreement of all other parties to the extension.

(d) Judge's review of exceptions and replies. The judge shall review all exceptions and replies and notify the referring agency and parties whether the judge recommends any changes to the proposal for decision.

(e) Judge's authority. The judge may:

(1) amend the proposal for decision in response to exceptions and replies to exceptions; and

(2) correct any clerical errors in the proposal for decision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803138
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

CHAPTER 159. RULES OF PROCEDURE FOR ADMINISTRATIVE LICENSE SUSPENSION PROCEEDINGS

1 TAC §§159.1, 159.3 - 159.5, 159.7, 159.9, 159.11, 159.13, 159.15, 159.17, 159.19, 159.21, 159.23, 159.25, 159.27, 159.29, 159.31, 159.33, 159.35, 159.37, 159.39, 159.41

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the

State Office of Administrative Hearings or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The State Office of Administrative Hearings (SOAH) proposes to repeal §§159.1, 159.3 - 159.5, 159.7, 159.9, 159.11, 159.13, 159.15, 159.17, 159.19, 159.21, 159.23, 159.25, 159.27, 159.29, 159.31, 159.33, 159.35, 159.37, 159.39, and 159.41.

The existing rules have been developed to provide a uniform set of procedural rules to be followed in administrative license suspension cases at SOAH. Repeal of the existing rules will allow the simultaneous adoption of new rules, which are being concurrently proposed, that remain uniform in application but that are clearer, updated, and easier to use.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the repeals are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Parsley, also has determined that for the first five-year period the repeals are in effect, the anticipated public benefit will be to ensure more uniform, clearer, updated, and better-organized guidelines for administrative license suspension cases. There will be no effect on small businesses as a result of enforcing the repeals. There is no anticipated economic cost to individuals who are required to comply with the proposed repeals.

Written comments on the proposed repeals must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, to P.O. Box 13025, Austin, Texas 78711-3025, or by email to debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The repeals are proposed under Texas Government Code, Chapter 2003, which authorizes the State Office of Administrative Hearings to conduct contested case hearings, Texas Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures, and §2003.050, which requires SOAH to adopt rules governing the procedures, including discovery procedures, that relate to a hearing conducted by SOAH.

The repeals affect Texas Government Code, Chapters 2001 and 2003.

§159.1. Scope.
§159.3. Definitions.
§159.4. Computation of Time.
§159.5. Notice of Suspension.
§159.7. Request for Hearing.
§159.9. Scheduling of Hearings.
§159.11. Continuances.
§159.13. Prehearing Discovery.
§159.15. Request for Appearance of Department's Witnesses.
§159.17. Request for Subpoenas.
§159.19. Issues.
§159.21. Issues in Cases Involving Commercial Drivers' Licenses.
§159.23. Hearing.
§159.25. Telephone Hearings.
§159.27. Failure To Attend Hearing and Default.
§159.29. Hearing Disposition.
§159.31. Decision of the Administrative Law Judge.
§159.33. Effective Date of Suspensions.
§159.35. Proceedings Open to the Public.
§159.37. Appeal of Judge's Decision.
§159.39. Stay of Suspension.
§159.41. Other Office Rules of Procedure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803140
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

CHAPTER 159. RULES OF PROCEDURE FOR ADMINISTRATIVE LICENSE SUSPENSION HEARINGS

SUBCHAPTER A. GENERAL

1 TAC §§159.1, 159.3, 159.5, 159.7

The State Office of Administrative Hearings (SOAH) proposes new §§159.1, 159.3, 159.5, and 159.7, comprising new Subchapter A. These proposed new rules concern the Administrative License Suspension Hearings, commonly known as the Administrative License Revocation (ALR) Program.

New Subchapter A, General, includes §§159.1, Scope; 159.3, Definitions; 159.5, Computation of Time; and 159.7, Other SOAH Rules of Procedure.

The new subchapter and sections are proposed to replace outdated sections, update and clarify remaining sections, insert new language where appropriate, and reorganize the chapter for ease of reference and use.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect, there will be no fiscal implications for state or local government as a result of the new rules.

Ms. Parsley also has determined that for each year of the first five years the new rules are in effect, the public benefit anticipated as a result will be more efficient administration of the ALR Program.

The proposed new rules are revisions of existing rules and do not impose new or additional requirements on small businesses. There is no anticipated economic cost to individuals who are required to comply with the proposed new rules.

Comments on the proposed new rules must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025 or by email to debra.anderson@soah.state.tx.us or by facsimile to (512) 463-1576.

The new rules are proposed under Texas Transportation Code §§522.105, 524.002 and 724.003 which authorize SOAH to promulgate rules for the administration of Chapters 522, 524 and 724 of the Texas Transportation Code.

The following statutes are affected by the proposed new rules: Texas Transportation Code, Chapters 522, 524 and 724; Texas Government Code, Chapters 2001 and 2003; and Texas Penal Code, Chapter 49.

§159.1. Scope.

(a) This chapter applies to contested hearings before SOAH concerning administrative suspension, denial, or disqualification of drivers' licenses under the Administrative License Revocation (ALR) Program governed by Texas Transportation Code, Chapters 522, 524, and 724.

(b) These regulations shall be construed to ensure the fair and expeditious determination of every action.

(c) These rules shall supplement the procedures required by law, but to the extent they conflict with Texas Government Code, Chapter 2001, the provisions of this chapter shall prevail.

§159.3. Definitions.

In this chapter, the following terms have the meaning indicated:

(1) Adult--An individual twenty-one years of age or older.

(2) ALR suspension--An administrative driver's license disqualification, suspension, or denial under the ALR Program which is the subject of this chapter.

(3) Alcohol concentration--Defined in Texas Penal Code §49.01.

(4) Alcohol-related or drug-related enforcement contact--Defined in Texas Transportation Code §524.001.

(5) Certified breath test technical supervisor--A person who has been certified by DPS to maintain and direct the operation of a breath test instrument used to analyze breath specimens of persons suspected of driving while intoxicated.

(6) Contested case--A proceeding brought under Texas Transportation Code, Chapter 522, Subchapter I; Chapter 524, Subchapter D; or Chapter 724, Subchapter D.

(7) Defendant--One who holds a license as defined in Texas Transportation Code, Chapter 521, or an unlicensed driver, whose legal rights, duties, statutory entitlement, or privileges may be affected by the outcome of a contested case under this chapter.

(8) Denial--The non-issuance of a license or permit, and loss of the privilege to obtain a license or permit.

(9) DPS--The Texas Department of Public Safety.

(10) Driver--A person who drives or is in actual physical control of a motor vehicle.

(11) Final decision--The decision issued by a judge who hears the contested case or another judge who reviewed the record in its entirety and who is authorized under appropriate law to issue final decisions in an ALR case.

(12) Intoxicated--Defined in Texas Penal Code §49.01(2).

(13) Minor--An individual under twenty-one years of age.

(14) Operate--To drive or be in actual physical control of a motor vehicle.

(15) Peace officer--A person elected, employed, or appointed as a peace officer under Texas Criminal Procedure Code §2.12 or other law. A peace officer may also be referred to as an arresting officer.

(16) Public place--Defined in Texas Penal Code, Chapter 1, and Texas Transportation Code, Chapter 524.

(17) Test--The taking of blood or breath specimens as set out in Texas Transportation Code, Chapters 522, 524 and 724.

(18) The following terms are defined in 1 Texas Administrative Code §155.5 (relating to Definitions): Administrative Law Judge or judge; APA; authorized representative; Chief Judge; law; party; person; and SOAH.

§159.5. Computation of Time.

In computing time periods prescribed by this chapter or by a judge's order, the day of the act, event, or default on which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, a Sunday, an official state holiday, or another day on which SOAH is closed, in which case the time period will be deemed to end on the next day that SOAH is open. When these rules specify a deadline or set a number of days for filing documents or taking other actions, the computation of time shall be by calendar days rather than business days, unless otherwise provided in this chapter or a judge's order. However, if the period within which to act is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted, unless this chapter or a judge's order otherwise specifically provides.

§159.7. Other SOAH Rules of Procedure.

Other SOAH rules of procedure found at Chapters 155 of this title (relating to Rules of Procedure), 157 of this title (relating to Temporary Administrative Law Judges) and 161 of this title (relating to Requests for Records) may apply in contested cases under this chapter unless there are specific applicable procedures set out in this chapter. The rules that specifically apply include:

(1) Subchapter D, §155.151 of this title (relating to Assignment of Judges to Cases);

(2) Subchapter D, §155.153 of this title (relating to Powers and Duties);

(3) Subchapter E, §155.201 of this title (relating to Representation of Parties);

(4) Subchapter I, §155.417 of this title (relating to Stipulations);

(5) Subchapter I, §155.425 of this title (relating to Procedure at Hearing);

(6) Subchapter I, §155.431 of this title (relating to Conduct and Decorum);

(7) §157.1 of this title (relating to Temporary Administrative Law Judges); and

(8) §161.1 of this title (relating to Charges for Copies of Public Information).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803141
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER B. REPRESENTATION

1 TAC §159.51

The State Office of Administrative Hearings (SOAH) proposes new §159.51, comprising new Subchapter B. The proposed new rule concerns the Administrative License Suspension Hearings, commonly known as the Administrative License Revocation (ALR) Program.

New Subchapter B, Representation, includes §159.51, Withdrawal of Counsel.

The new subchapter and section are proposed to replace outdated sections, update and clarify remaining sections, insert new language where appropriate, and reorganize the chapter for ease of reference and use.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rule is in effect, there will be no fiscal implications for state or local government as a result of the new rule.

Ms. Parsley also has determined that for each year of the first five years the new rule is in effect, the public benefit anticipated as a result will be more efficient administration of the ALR Program.

The proposed new rule is a revision of existing rules and does not impose new or additional requirements on small businesses. There is no anticipated economic cost to individuals who are required to comply with the proposed new rule.

Comments on the proposed new rule must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025 or by email to debra.anderson@soah.state.tx.us or by facsimile to (512) 463-1576.

The new rule is proposed under Texas Transportation Code §§522.105, 524.002 and 724.003 which authorize SOAH to promulgate rules for the administration of Chapters 522, 524 and 724 of the Texas Transportation Code.

The following statutes are affected by the proposed new rule: Texas Transportation Code, Chapters 522, 524 and 724; Texas Government Code, Chapters 2001 and 2003; and Texas Penal Code, Chapter 49.

§159.51. Withdrawal of Counsel.

(a) An attorney may seek to withdraw from representing a defendant only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the defendant, the motion shall state the substituted attorney's name, address, telephone number, and telecopier number and state that the attorney approves the substitution.

(b) If the defendant has no substitute attorney, the withdrawing attorney must include the defendant's last known address and a statement indicating whether the defendant consents to the withdrawal. If defendant does not consent to the withdrawal, the attorney also must affirm that the defendant has been informed of the right to object to the motion.

(c) If the motion to withdraw is granted, the withdrawing attorney shall immediately notify the defendant in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and about which the attorney has not already notified the defendant.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803142
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER C. WITNESSES AND SUBPOENAS

1 TAC §159.101, §159.103

The State Office of Administrative Hearings (SOAH) proposes new §159.101, and §159.103, comprising new Subchapter C. These proposed new rules concern the Administrative License Suspension Hearings, commonly known as the Administrative License Revocation (ALR) Program.

New Subchapter C, Witnesses and Subpoenas, includes §159.101, Breath Test Operator and Technical Supervisor; and §159.103, Subpoenas.

The new subchapter and sections are proposed to replace outdated sections, update and clarify remaining sections, insert new language where appropriate, and reorganize the chapter for ease of reference and use.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect, there will be no fiscal implications for state government as a result of the new rules. The change in the mileage fee could impact local governments in that the increased mileage fee will assist local governments by defraying the travel costs of peace officers who are compelled to testify at hearings. Defendants in administrative license suspension hearings would bear the increased cost of paying mileage for witnesses who appear in person.

Ms. Parsley also has determined that for each year of the first five years the new rules are in effect, the public benefit anticipated as a result will be more efficient administration of the ALR Program.

The proposed new rules are revisions of existing rules and do not impose new or additional requirements on small businesses. There is no anticipated economic cost to individuals who are required to comply with the proposed new rules.

Comments on the proposed new rules must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025 or by email to debra.anderson@soah.state.tx.us or by facsimile to (512) 463-1576.

The new rules are proposed under Texas Transportation Code §§522.105, 524.002 and 724.003 which authorize SOAH to promulgate rules for the administration of Chapters 522, 524 and 724 of the Texas Transportation Code.

The following statutes are affected by the proposed new rules: Texas Transportation Code, Chapters 522, 524 and 724; Texas Government Code, Chapters 2001 and 2003; and Texas Penal Code, Chapter 49.

§159.101. Breath Test Operator and Technical Supervisor.

(a) Upon receipt of a timely request for the appearance of the certified breath test operator who administered the test and obtained the defendant's specimen to determine the level of alcohol concentration in the defendant's body and/or the certified breath test technical supervisor, DPS shall ensure that the requested individuals appear at the hearing.

(b) Requests for witnesses under this section are limited to cases under Texas Transportation Code §522.081(b)(4) and §522.081(d)(3)(C) and Chapter 524.

§159.103. Subpoenas.

(a) Scope.

(1) A subpoena may command a person to give testimony for an ALR hearing and/or produce designated documents or tangible things in the actual possession of that person.

(2) The party who causes a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served.

(3) If a party that requests or issues a subpoena fails to timely appear at the hearing, any subpoenaed witnesses will be released.

(b) Attorney-issued subpoenas. An attorney who is authorized to practice law in the State of Texas may issue up to two subpoenas for witnesses to appear at a hearing. A subpoena may be issued only on the form provided at www.soah.state.tx.us. One subpoena may be issued to compel the presence of the peace officer who was primarily responsible for the defendant's stop or initial detention and the other may be issued to compel the presence of the peace officer who was primarily responsible for finding probable cause to arrest the defendant. If the same officer was primarily responsible for both the defendant's stop and arrest, the attorney may issue only one subpoena.

(c) Subpoena request filed with judge. No later than ten days prior to the hearing, a party may file a subpoena request with SOAH that demonstrates good cause to compel a witness's appearance in person or by telephone or video conference, when:

(1) a party intends to call more than two peace officers to testify as witnesses;

(2) a party seeks to compel the presence of witnesses who are not peace officers; or

(3) a defendant, who is not represented by an attorney, seeks to compel the presence of witnesses.

(d) Subpoena form. A subpoena request filed with a judge must be submitted on the form provided at www.soah.state.tx.us.

(e) Judge's discretion. The decision to issue a subpoena, as described in subsection (c) of this section, shall be in the sound discretion of the judge assigned to the case. The judge shall refuse to issue a subpoena if:

(1) the testimony or documentary evidence is immaterial, irrelevant, or would be unduly repetitious; or

(2) good cause has not been demonstrated.

(f) Service upon witness.

(1) The party who issues or is granted a subpoena shall be responsible for having the subpoena served in accordance with Texas Rule of Civil Procedure 176.5, or by accepted alternative methods established by that peace officer's law enforcement agency.

(2) A subpoena must be served at least five calendar days before the hearing.

(3) After a subpoena issued by an attorney or judge is served upon a witness, a witness fee check or money order in the amount of $10 and the return of service of the subpoena must be filed at SOAH at least three calendar days prior to the hearing. In addition, if the witness will be traveling more than 25 miles round-trip to the hearing from the witness's office or residence, mileage reimbursement must also be filed with SOAH at the same time. The amount of mileage reimbursement will be that listed in the state mileage guide at http://ecpa.cpa.state.tx.us/mileage/Mileage.jsp.

(4) If special equipment will be required in order to offer subpoenaed documents or tangible things, the party seeking their admission shall be required to supply the necessary equipment. The party requesting a subpoena duces tecum may be required to advance the reasonable costs of reproducing the documents or tangible things requested.

(g) Service upon opposing party.

(1) A party that issues a subpoena under subsection (b) of this section must serve the opposing party with a copy of the subpoena on the same date it is issued.

(2) A party that requests a subpoena under subsection (c) of this section must serve the opposing party with a copy of the request at the time it is filed with SOAH.

(3) A party that serves a subpoena must provide the opposing party with a copy of the return of service when the subpoena has been served and not later than three calendar days prior to the hearing.

(h) Continuing effect. A properly issued subpoena remains in effect until the judge releases the witness or grants a motion to quash or for protective order. If a hearing is rescheduled and a subpoena is extended, and unless the judge specifically directs otherwise, the party who requested the continuance shall promptly notify any subpoenaed witnesses of the new hearing date.

(i) Motion to quash or for protective order.

(1) On behalf of a subpoenaed witness, a party may move to quash a subpoena or for a protective order. The movant that moves to quash a subpoena must serve the motion on the other party at the time the motion is filed with SOAH.

(2) A party may seek an order from the judge at any time after the motion to quash or motion for protective order has been filed.

(3) In ruling on motions to quash or for protection, the judge must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The judge also may impose reasonable conditions on compliance with a subpoena.

(4) If a subpoena request is denied or if a subpoena is quashed, any witness fee or mileage reimbursement fee that has been tendered to a witness shall be returned to the party who tendered the fees.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803143
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER D. DISCOVERY

1 TAC §159.151

The State Office of Administrative Hearings (SOAH) proposes new §159.151, comprising new Subchapter D. The proposed new rule concerns the Administrative License Suspension Hearings, commonly known as the Administrative License Revocation (ALR) Program.

New Subchapter D, Discovery, includes §159.151, Prehearing Discovery.

The new subchapter and section are proposed to replace outdated sections, update and clarify remaining sections, insert new language where appropriate, and reorganize the chapter for ease of reference and use.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rule is in effect, there will be no fiscal implications for state or local government as a result of the new rule.

Ms. Parsley also has determined that for each year of the first five years the new rule is in effect, the public benefit anticipated as a result will be more efficient administration of the ALR Program.

The proposed new rule is a revision of existing rules and does not impose new or additional requirements on small businesses. There is no anticipated economic cost to individuals who are required to comply with the proposed new rule.

Comments on the proposed new rule must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025 or by email to debra.anderson@soah.state.tx.us or by facsimile to (512) 463-1576.

The new rule is proposed under Texas Transportation Code §§522.105, 524.002 and 724.003 which authorize SOAH to promulgate rules for the administration of Chapters 522, 524 and 724 of the Texas Transportation Code.

The following statutes are affected by the proposed new rule: Texas Transportation Code, Chapters 522, 524 and 724; Texas Government Code, Chapters 2001 and 2003; and Texas Penal Code, Chapter 49.

§159.151. Prehearing Discovery.

The scope of prehearing discovery in these proceedings is as follows:

(1) A defendant shall be allowed to review, inspect and obtain copies of any non-privileged documents or records in DPS's ALR file or in the possession of DPS's ALR Division. All requests for discovery must be in writing and shall be served upon DPS as prescribed in 37 Texas Administrative Code §17.16 (relating to Service on the Department of Certain Items Required to be Served on, Mailed to, or Filed with the Department). The request for discovery may not be filed with DPS sooner than the date of the request for hearing, and may not be filed sooner than five days from the date of the notice of suspension. Upon a showing of harm by the defendant, and upon a showing of a proper request for discovery, no document in the ALR Division's actual possession will be admissible unless it was provided to the defendant within five business days of the receipt of the request for production. If the ALR Division does not have any or all the documents in its actual possession, it shall respond within five business days of defendant's request, setting out that it does not have the documents in its actual possession. DPS has a duty to supplement all its discovery responses within five business days from the time DPS's ALR Division receives possession of the discoverable documents. If a document is received by the defendant fewer than seven calendar days prior to the scheduled hearing, the judge shall grant a continuance on the request of a party. The judge may grant only one continuance for DPS's production of documents fewer than seven calendar days prior to the scheduled hearing.

(2) If a request for inspection, maintenance and/or repair records for the instrument used to test the defendant's specimen is made by the defendant, and those records are in the actual possession of DPS, DPS shall supply such records to the defendant within five days of receipt of the request, provided however, that the records to be provided shall be for the period covering 30 days prior to the test date and 30 days following the test date. If DPS fails to provide the properly requested records, after the defendant has paid reasonable copying charges for the records, evidence of the breath specimen shall not be admitted into evidence.

(3) Depositions, interrogatories, and requests for admission shall not be permitted in ALR proceedings.

(4) Notwithstanding paragraph (1) of this section, if a party believes evidence from a third party is relevant and probative to the case, the party may request issuance of a subpoena duces tecum pursuant to §159.103 of this title (relating to Subpoenas) to have the evidence produced at the hearing. If a person subpoenaed under this section does not appear, the judge may grant a continuance to allow for enforcement of the subpoena. Should introduction of such evidence require special equipment, the party seeking admission of the evidence shall be required to supply such equipment. The judge may condition the granting of the subpoena duces tecum upon the advancement by the person requesting the subpoena of the reasonable costs of reproducing the documents requested.

(5) Notwithstanding anything to the contrary contained in this section, DPS has the right to request non-privileged documents from the defendant. Except in cases where sanctions may be sought for abuse of discovery under §155.157 of this title (relating to Sanctioning Authority), all requests from DPS shall be made under the provisions of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803145
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER E. HEARING AND PREHEARING

1 TAC §§159.201, 159.203, 159.205, 159.207, 159.209, 159.211, 159.213

The State Office of Administrative Hearings (SOAH) proposes new §§159.201, 159.203, 159.205, 159.207, 159.209, 159.211, and 159.213, comprising new Subchapter E. These proposed new rules concern the Administrative License Suspension Hearings, commonly known as the Administrative License Revocation (ALR) Program.

New Subchapter E, Hearing and Prehearing, includes §§159.201, Scheduling and Notice of Hearing; 159.203, Waiver or Dismissal of Hearing; 159.205, General Request for Relief; 159.207, Continuances; 159.209, Participation by Telephone or Videoconference; 159.211, Hearings; and 159.213, Failure to Attend Hearing and Default.

The new subchapter and sections are proposed to replace outdated sections, update and clarify remaining sections, insert new language where appropriate, and reorganize the chapter for ease of reference and use.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect, there will be no fiscal implications for state or local government as a result of the new rules.

Ms. Parsley also has determined that for each year of the first five years the new rules are in effect, the public benefit anticipated as a result will be more efficient administration of the ALR Program.

The proposed new rules are revisions of existing rules and do not impose new or additional requirements on small businesses. There is no anticipated economic cost to individuals who are required to comply with the proposed new rules.

Comments on the proposed new rules must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025 or by email to debra.anderson@soah.state.tx.us or by facsimile to (512) 463-1576.

The new rules are proposed under Texas Transportation Code §§522.105, 524.002 and 724.003 which authorize SOAH to promulgate rules for the administration of Chapters 522, 524 and 724 of the Texas Transportation Code.

The following statutes are affected by the proposed new rules: Texas Transportation Code, Chapters 522, 524 and 724; Texas Government Code, Chapters 2001 and 2003; and Texas Penal Code, Chapter 49.

§159.201. Scheduling and Notice of Hearing.

(a) On receipt of a timely request for hearing, DPS shall schedule a hearing to be conducted by a SOAH judge.

(b) The location of the hearing will be set in accordance with the requirements of Texas Transportation Code §524.034 and §724.041. SOAH or DPS may change the hearing site upon agreement of all parties.

(c) Once DPS issues the notice of hearing scheduling the hearing by telephone or videoconference, the hearing may be removed from that docket only upon timely request pursuant to §159.207 of this title (relating to Continuances) or by agreement of the parties and with the ALJ's consent.

(d) It is a rebuttable presumption that DPS mailed the notice of the hearing to the defendant on the same date as the date listed in the notice.

§159.203. Waiver or Dismissal of Hearing.

(a) Waiver of Request for Hearing. The defendant may waive the request for hearing at any time before the administrative order is final. If the defendant requests a waiver after the notice of hearing is issued, the judge will enter an order accepting the waiver.

(b) Rescission of Notice of Suspension. If, after issuing a notice of hearing, DPS rescinds a notice of suspension, it shall immediately inform SOAH and the defendant of the rescission. A judge may, on his or her own motion, dismiss the case from its docket once the notice of suspension has been rescinded.

§159.205. General Request for Relief.

After a hearing has been scheduled before SOAH, any party making a request that requires an interim order must file a motion that describes the relief requested. The motion must contain a certificate of service and a certificate of conference stating whether the opposing party has agreed to the request. Motions must be filed no later than five days before the hearing date, but for good cause demonstrated in the motion, the judge may consider a motion filed after that time or presented orally at a hearing.

§159.207. Continuances.

(a) A request for continuance will be considered in accordance with the provisions of Texas Transportation Code §524.032(b) and (c) (relating to rescheduling a hearing upon a defendant's request), §524.039 (relating to appearance of technicians), and Texas Transportation Code §724.041(g). DPS shall immediately notify SOAH of a continuance request under Texas Transportation Code §524.032(b).

(b) A judge may grant a continuance if a subpoenaed witness is unavailable for the hearing.

(c) The granting of continuances shall be in the sound discretion of the judge, provided however, that the judge shall expedite the hearings whenever possible. A party requesting a continuance shall supply three dates on which the parties will be available for rescheduling of the hearing. The judge will consider these dates in resetting the case. Failure to include a certificate of service, a certificate of conference, and three alternative dates may result in denial of the continuance request or subsequent continuance requests in the same case.

(d) With the exception of a hearing that is rescheduled in accordance with Texas Transportation Code §524.032(b), no party is excused from appearing at a hearing until notified by SOAH that a motion for continuance has been granted.

§159.209. Participation by Telephone or Videoconference.

(a) Consent of the parties. The judge may, with consent of the parties and if SOAH has been notified of a telephone or videoconference hearing request at least 14 days prior to the hearing date, conduct all or part of the hearing on the merits by telephone or videoconference if each participant in the hearing has an opportunity to participate in and hear the entire proceeding. The judge may conduct all or part of a hearing on preliminary matters by telephone or videoconference, on the judge's own motion, if each participant has an opportunity to participate in and hear the entire proceeding.

(b) Procedural Rights and Duties. All substantive and procedural rights and duties apply to telephone or videoconference hearings,

subject only to the limitations of the physical arrangement. The parties shall notify SOAH of their telephone or videoconference numbers for the purpose of their appearances at the hearing. The parties shall contact their respective witnesses to assure their availability at the hearing.

(c) Documentary evidence. To be offered in a telephone or videoconference hearing, copies of exhibits should be marked and must be filed with SOAH and all parties no later than two business days prior to the scheduled hearing, unless otherwise agreed by the parties. If a witness, in preparation for or during testimony, reviews any document that has not been prefiled and the opposing party requests an opportunity to review the document, the judge may go off the record and allow the witness to read the document to the opposing party.

(d) Default. For a telephone or videoconference hearing, the following may be considered a failure to appear and grounds for default, if the conditions exist for more than ten minutes after the scheduled time for hearing:

(1) failure to answer the telephone or videoconference line;

(2) failure to free the line for the proceeding; or

(3) failure to be ready to proceed with the hearing or a pre-hearing or post-hearing conference, as scheduled.

§159.211. Hearings.

(a) Procedures.

(1) Hearings shall be conducted in accordance with the APA, Texas Government Code, Chapter 2001, when applicable, and with this chapter, provided that if there is a conflict between the APA and this chapter, this chapter shall govern. If a conflict exists between this chapter and the Texas Transportation Code, Chapters 522, 524, or 724, and these rules cannot be harmonized with those chapters, the applicable Texas Transportation Code provision controls.

(2) Once the hearing has begun, the parties may be off the record only when the judge permits. If a discussion off the record is pertinent, the judge will summarize it for the record.

(3) In the interest of justice and efficiency, the judge may question witnesses.

(4) The judge shall exclude testimony or any evidence which is irrelevant, immaterial, or unduly repetitious.

(b) Evidence. Pursuant to Texas Government Code §2001.081, the rules of evidence as applied in a non-jury civil case in a district court of this state shall apply in ALR proceedings.

(c) Witnesses and affidavits.

(1) All witnesses shall testify under oath.

(2) An officer's sworn report of relevant information shall be admissible as a public record. However, the defendant shall have the right to subpoena the officer in accordance with §159.103 of this title (relating to Subpoenas). If the defendant timely subpoenas an officer and the officer fails to appear without good cause, information obtained from that officer shall not be admissible. In the alternative, if the party who requested the subpoena wants to seek enforcement of the subpoena, the judge may grant the party a continuance.

(3) The judge, on his or her own motion or on request of a party and with the consent of all parties, may allow the testimony of any witness to be taken by telephone or videoconference, provided that all parties have the opportunity to participate in and hear the proceeding. All substantive and procedural rights apply to the telephone or videoconference appearance of a witness, subject to the limitations of the physical arrangement as described in §159.209(b) of this title (relating to Participation by Telephone or Videoconference).

(d) Record of hearing.

(1) The judge shall make an accurate and complete recording of the oral proceedings of the hearing.

(2) SOAH will maintain a case file that includes the recording, pleadings, evidence, and the judge's decision.

(3) SOAH will maintain case files in accordance with the terms of its records retention schedule.

(e) Interpreters. When an interpreter will be needed for all or part of a proceeding, a party shall file a written request at least seven days before the hearing. SOAH shall provide and pay for:

(1) an interpreter for deaf or hearing impaired parties and subpoenaed witnesses in accordance with §2001.055 of the APA;

(2) reader services or other communication services for blind and sight-impaired parties and witnesses; and

(3) a certified language interpreter for parties and witnesses who need that service.

(f) If the defendant fails to make a timely request, the judge may provide an interpreter or may continue the hearing to secure an interpreter.

§159.213. Failure to Attend Hearing and Default.

(a) Upon proof by DPS that notice of the hearing on the merits was mailed to defendant's or defense counsel's last known address, if defendant has legal representation, and that notwithstanding such notice, defendant failed to appear, defendant's right to a hearing on the merits is waived. A rebuttable presumption that proper notice was given to the defendant may be established by the introduction of a notice of hearing dated not earlier than eleven days prior to the hearing date and addressed to defendant's or defense counsel's last known address, as reflected on defendant's notice of suspension, request for hearing, driving record or similar documentation presented by DPS. Under those circumstances, the judge will proceed in defendant's absence and enter a default order.

(b) Within ten business days of the default, the defendant may file a written motion with SOAH and DPS requesting that the default order be vacated because the defendant had good cause for failing to appear. In the motion, the defendant must state whether DPS opposes the motion, and if DPS does oppose the motion, list dates and times for a hearing on the motion that are agreeable to both parties. Whether or not DPS opposes the motion, the judge may rule on the motion without setting a hearing or may set a hearing to consider the motion. A hearing on a motion to vacate a default order may be held by telephone conference call. If the judge finds good cause for the defendant's failure to appear, the judge shall vacate the default order and reset the case for a hearing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803146
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

SUBCHAPTER F. DISPOSITION OF CASE

1 TAC §§159.251, 159.253, 159.255

The State Office of Administrative Hearings (SOAH) proposes new §§159.251, 159.253, and 159.255, comprising new Subchapter F. These proposed new rules concern the Administrative License Suspension Hearings, commonly known as the Administrative License Revocation (ALR) Program.

New Subchapter F, Disposition of Case, includes §§159.251, Hearing Disposition; 159.253, Decision of the Judge; and 159.255, Appeal of Judge's Decision.

The new subchapter and sections are proposed to replace outdated sections, update and clarify remaining sections, insert new language where appropriate, and reorganize the chapter for ease of reference and use.

Cathleen Parsley, General Counsel, has determined that for the first five-year period the new rules are in effect, there will be no fiscal implications for state or local government as a result of the new rules.

Ms. Parsley also has determined that for each year of the first five years the new rules are in effect, the public benefit anticipated as a result will be more efficient administration of the ALR Program.

The proposed new rules are revisions of existing rules and do not impose new or additional requirements on small businesses. There is no anticipated economic cost to individuals who are required to comply with the proposed new rules.

Comments on the proposed new rules must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra A. Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025 or by email to debra.anderson@soah.state.tx.us or by facsimile to (512) 463-1576.

The new rules are proposed under Texas Transportation Code §§522.105, 524.002 and 724.003 which authorize SOAH to promulgate rules for the administration of Chapters 522, 524 and 724 of the Texas Transportation Code.

The following statutes are affected by the proposed new rules: Texas Transportation Code, Chapters 522, 524 and 724; Texas Government Code, Chapters 2001 and 2003; and Texas Penal Code, Chapter 49.

§159.251. Hearing Disposition.

(a) If the judge finds that DPS proved the requisite facts as specified in Texas Transportation Code §§522.105, 524.035, or 724.042 by a preponderance of the evidence, the judge shall grant DPS's petition.

(b) If the judge finds that DPS did not prove all of the requisite facts by a preponderance of the evidence, the judge shall deny DPS's petition, and DPS shall not be authorized to suspend or deny the defendant's license or disqualify the defendant from receiving a license for the conduct at issue.

§159.253. Decision of the Judge.

(a) Upon conclusion of the hearing, the judge shall issue a written decision that includes findings of fact and conclusions of law.

(b) The decision of the judge is final and appealable. No party shall file a motion for rehearing with SOAH.

§159.255. Appeal of Judge's Decision.

(a) The record on appeal shall consist of the following:

(1) the first file-marked or stamped copy of all parties' motions or other pleadings;

(2) all written orders or decisions issued by the judge and any evidence of transmittal to the parties;

(3) all exhibits admitted into evidence;

(4) all exhibits not admitted into evidence but made a part of the record by a party as an offer of proof or bill of exceptions; and

(5) a transcription of the proceedings electronically recorded by SOAH.

(b) A person who appeals a suspension may obtain a transcript of the administrative hearing by sending a written request to SOAH within ten days of filing the appeal and paying the applicable fees. The fees shall not exceed the actual cost of preparing or copying the transcript, and upon receipt of the fees, SOAH shall promptly furnish the reviewing court and both parties a certified copy of the record. The transcription of the electronic recording made by SOAH constitutes the official record for appellate purposes. For three years after notice of an appeal is filed, SOAH will maintain the file and original recording of proceedings. A copy of the file and recording will be available for review by the parties or a reviewing court, if needed.

(c) If a case is remanded for taking of additional evidence, the appellant must file with SOAH, within ten days of the signing of the reviewing court's remand order, a request for relief, including setting a hearing on remand. The request must include a copy of the remand order and an estimate of the time required to present the additional evidence, if a hearing is requested.

(d) A remand under this section does not stay the suspension of a driver's license.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803147
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-4931

♦ ♦ ♦

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8065

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.8065, concerning Additional Reimbursement to Disproportionate Share Hospitals.

Background and Justification

Hospitals participating in the Texas Medicaid program that meet the conditions of participation and that serve a disproportionate share of low-income patients are eligible for additional reimbursement through the disproportionate share hospital (DSH) program. HHSC, as the Medicaid single state agency, establishes each hospital's eligibility for reimbursement and the amount of reimbursement, as specified in this rule.

The proposed amendments to §355.8065 revise the Medicaid DSH reimbursement methodology for hospitals other than state-owned teaching hospitals. State-owned teaching hospitals are addressed in a separate amendment to §355.8067, concerning Disproportionate Share Hospital Reimbursement Methodology for State-Owned Teaching Hospitals, which is being proposed concurrently in this issue of the *Texas Register.* The proposed amendments to §355.8065 clarify current practices as well as make changes to the processes used to determine, review, and audit DSH payments.

The amendments to §355.8065 fall into four broad categories. First, most of the rule changes reflect efforts to more equitably distribute federal DSH funds among Texas hospitals. Since there is a set amount of aggregate DSH money available to Texas hospitals annually, if one hospital receives more DSH money, other hospitals receive less. Several of the proposed changes standardize certain program elements among hospitals participating in the DSH program to create consistent requirements for all hospitals. Also, in subsections (d)(5) and (e)(5), HHSC proposes to lower the threshold by which small urban hospitals qualify for DSH funding, which will allow some hospitals that serve as an important safety in their areas to qualify for funding. Finally, in subsection (f)(4)(C), HHSC proposes to lower weights used in the DSH formula that are applied to certain hospital districts' Medicaid and low-income patient days. The effect of this change is to emphasize in the formula each DSH hospital's actual number of inpatient days for Medicaid and low-income patients.

Second, HHSC has given certain assurances to the Centers for Medicare and Medicaid Services (CMS). After an audit by the federal Health and Human Services Office of Inspector General, HHSC agreed to add DSH rule language to codify its administrative practices relating to: calculating cost-to-charge ratios, handling Medicaid profits in calculating a hospital's Medicaid shortfall, and calculating uninsured costs.

Third, the proposed deletion of subsection (f)(2)(D) removes conversion factors to restore DSH funds to approximately 60 private urban hospitals, in conjunction with an amendment to 1 TAC §355.8063(u) proposed in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4280), which discontinues high volume payments made annually to these same hospitals.

Finally, the changes in subsections (f)(2) and (i) relate to Medicaid reform initiatives at Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund. HHSC submitted a Medicaid reform waiver request to CMS on April 16, 2008, with a comprehensive plan to transform health care in Texas by providing more people with insurance, reducing reliance on expensive emergency room visits for basic care, and making it easier for the working poor to buy into employer-sponsored health coverage. HHSC proposes to use a portion of non-state hospital DSH funds that are the subject of these amendments to help finance the reform.

Section-by-Section Summary

The amendment in subsection (a) explains that a hospital must apply for DSH funds annually. Subsection (a) also explains that DSH funds are available only to an entity licensed as a hospital by the state.

The amendments in subsection (b) delete the definition of "bad debt charges" and clarify other definitions, including "cost-to-charge ratio," "inflation update factor," and "total state and local revenue." The change to the definition of "total state and local revenue" clarifies that a hospital may not report as state and local revenue payment sources that include any federal dollars, including Children's Health Insurance Program (CHIP) payments funded under Title XXI. In this definition, the list of payment sources containing federal dollars is not an exhaustive list. HHSC also proposes changing a number of definitions to specify that HHSC will use adjudicated claims data rather than billed claims data as the basis for DSH qualification and payment computations.

Subsection (c) sets out the conditions for participation in the DSH program. The amendments in subsection (c) and in subsections (f), (g), (h), and (i), change the DSH program payments from a state fiscal year to the federal fiscal year to match the federal DSH payment year. Also, the amendments delete conditions of participation that are no longer required. Finally, the amendments add a new requirement that a participating hospital must provide HHSC access to the hospital's records and accounting systems.

In subsections (d) and (e), which relate to determining DSH status, the proposed amendments clarify that a hospital in an urban county with 250,000 or fewer persons qualifies for DSH funding if its total Medicaid inpatient days are at least 70 percent of the sum of: (1) the mean Medicaid inpatient days, and (2) one standard deviation above the mean Medicaid inpatient days, for all hospitals participating in the Medicaid program in urban counties of 250,000 or fewer persons, according to the most recent decennial census.

Most of the amendments in subsection (f) revise the language to clarify how DSH payments are made to different hospital types. For instance, the amendment in subsection (f)(3)(A) changes the amount of funds that a state chest hospital may receive under this rule from up to 175 percent to up to 100 percent of its adjusted hospital-specific limit. Also, the amendments in subsection (f)(4)(C)(i) - (v) adjust the weights applied to children's hospitals and hospital districts in the DSH formula, and provide that HHSC may adjust the DSH formula weights to address changes in program size.

One of the changes to this subsection relates to Medicaid reform. This amendment adds subsection (f)(2) to inform non-state DSH hospitals of a potential change in their aggregate DSH funding level if HHSC receives a Medicaid waiver related to the Texas Health Opportunity Pool (HOP) Trust Fund. If HHSC increases Medicaid inpatient or outpatient rates for non-state DSH providers and if needed to implement the HOP, the estimated aggregate amount of that increase will be subtracted from the amount of DSH funds paid under this subsection in that same federal fiscal year and subsequent years. This reduction will not affect children's hospitals, psychiatric hospitals, rural hospitals, or certain hospitals with special designations related to access to care, all of which are paid based on methodologies different from the other non-state DSH hospitals.

The amendment to subsection (f) also deletes current subsection (f)(4)(D) to discontinue conversion factors that will no longer

be used in the DSH formula. This change will restore DSH funds to approximately 60 private urban hospitals. In conjunction with this amendment, an amendment to 1 TAC §355.8063(u), proposed in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4280), discontinues high volume payments made annually to these same hospitals. The combined result of these two rule changes is that these private hospitals will not be impacted in their total Medicaid reimbursement.

The amendment in re-numbered subsection (f)(4)(D) explains that when a hospital has a Medicaid profit in its calculation of Medicaid shortfall, the hospital's cost of uninsured patients will be lowered by the amount of the profit. The amendment to subsection (f)(4)(D)(ii) specifies that HHSC does not consider non-hospital services in the calculation of the ratio of costs to charges. The amendment to subsection (f)(4)(D)(iii) prohibits participating hospitals from including certain unreimbursable cost centers, as defined by CMS, and details the cut-off date for hospitals to report charges and payments for services to the uninsured.

The amendment at subsection (g) explains that a hospital may request a review of its ineligibility for DSH or its estimated DSH payment amounts. The amendment also describes the review process, including the grounds for review and the procedure and timelines for requesting a review.

The amendment at subsection (i) provides that, if a federal waiver is secured to implement the Medicaid reform provisions related to the Texas Health Opportunity Pool Trust Fund, HHSC will not redistribute DSH funds if a hospital voluntarily withdraws from the DSH program or does not re-apply to participate in the program, even though it would have qualified for DSH funding. The amendment also prohibits such hospitals from receiving DSH payments for the next three consecutive federal fiscal years.

The amendment at subsection (j) describes the recoupment and redistribution of DSH funds if an overpayment is made to a hospital.

The amendment at subsection (k) explains that DSH payments are subject to the availability of state and federal funds.

The amendment at subsection (l) clarifies that if a hospital is located in a federal natural disaster area, while HHSC may accept older data to meet state DSH requirements, it cannot waive certain federal requirements.

The amendment at subsection (m) requires HHSC to conduct periodic on-site audits and desk reviews using statistically valid methods.

The amendment at subsection (n) explains that, if a hospital fails to maintain and provide adequate documentation to support its data, HHSC will exclude that data from DSH calculations for that hospital.

Other changes were made throughout the rule to update references, move language and re-order provisions as necessary to reflect changes.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that for the first five-year period the proposed amendment is in effect, there are no fiscal implications for state government as a result of enforcing or administering the proposed amendments to this section. The proposed rule will not result in any fiscal implications for local health and human services agencies.

The impact on individual local governments, including hospital districts, cannot be determined. HHSC cannot accurately forecast future DSH payments to non-state hospitals, including those associated with local governments, for several reasons. First, HHSC does not know the dollar size of the non-state DSH program for future years. Second, HHSC does not know how many non-state hospitals will receive DSH payments in future years. Finally, HHSC does not know how the DSH calculation will impact individual non-state hospitals that may qualify in future years.

However, HHSC anticipates that the net fiscal impact of the Medicaid reform-related amendments on each disproportionate share hospital, including those affiliated with a hospital district or other local government, will be zero. Each hospital will get an amount of Medicaid revenue from new §355.8052, proposed in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4269), to offset any funds reduced in its DSH allocation under this rule.

Based on fiscal year 2008 DSH data, HHSC anticipates that the amendments in subsections (d)(5) and (e)(5) that lower the threshold by which small urban hospitals qualify for DSH funding will reallocate up to $8.3 million in DSH funds to certain small urban hospitals that did not qualify for DSH funds in fiscal year 2008.

Small Business and Micro-Business Impact Analysis

Economic Impact Statement

Mr. Suehs also has determined that this rule may have an adverse fiscal impact on hospitals that participate in the DSH program, including hospitals that qualify as a small or micro-business under Government Code §2006.001(2). HHSC estimates that 5 non-state hospitals participating in the DSH program for fiscal year 2008 qualify as small businesses. However, HHSC cannot predict how many or which hospitals will be affected by the proposed changes, or by how much. Even without the proposed rule changes, HHSC cannot predict from year to year which hospitals will qualify for DSH and for what percentage of available DSH funds.

Many of the proposed changes will alter the distribution of DSH funds among non-state hospitals, including changes that standardize DSH program elements across hospitals. These changes may increase or decrease the amount of DSH funds a hospital will receive depending on each hospital's current reporting practices. For example, the change in subsection (f)(4)(D)(iii) specifies that on its annual DSH application, each hospital that reports charges for patients without health insurance or other third party coverage must include related adjustments to charges and payments during the hospital's fiscal year and for five months thereafter. Under the current rule, there is no set cut-off date for DSH application data, so that one hospital may include charge adjustments and payments for three months after the end of the fiscal year, while another may include data through six months after the end of its fiscal year. The hospital that uses a three-month cut-off date may overstate its uncompensated care costs relative to the hospital that reports payments received up to six months after the end of the fiscal year. So, the standardized timeframe will have a differential impact on each DSH hospital. HHSC believes that the new standard five-month cut-off will result in a more equitable distribution of DSH funds.

Another proposed change adjusts weights in the DSH formula that are applied to certain hospital districts' Medicaid and low-income patient days. Small businesses may benefit from this change in that by lowering weights applied to certain hospital districts' Medicaid and low-income days, small businesses may receive a larger portion of total available DSH dollars.

Finally, HHSC anticipates that the net fiscal impact of the Medicaid reform-related amendments on each disproportionate share hospital, including those that are small or micro-businesses, will be zero. Although under the proposed amendments, any particular qualifying hospital may receive less in DSH funding in one year, the decrease will be offset with an equal increase in each hospital's Medicaid inpatient payments under new §355.8052, which was proposed in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4269). Some small business hospitals that receive the Medicaid inpatient payment increase under §355.8052, such as rural hospitals and certain hospitals with special designations related to access to care, will not have their DSH funds reduced.

Regulatory Flexibility Analysis

HHSC considered a number of issues and alternatives prior to proposing these rules. The Medicaid reform provisions of the proposed rule stem from Senate Bill 10, 80th Legislature, Regular Session, 2007, which instructed HHSC to seek a Section 1115 Medicaid reform waiver from CMS to provide more people with health insurance, reduce reliance on expensive emergency room visits for basic care, and make it easier for the working poor to buy into employer-sponsored health coverage. It was the intent of the 80th Legislature that HHSC use a portion of DSH funds to finance the Medicaid reform objectives.

In preparing this proposed rule, HHSC considered not standardizing the DSH program reporting elements, but decided that the benefit of a more equitable distribution of funds outweighed retaining the current disparate elements. HHSC considered not changing the weights in subsection (f)(4), but concluded that weighting that it would be equitable to use weights that more accurately reflect each hospital's days of service to Medicaid and low-income patients.

HHSC also considered adding to the proposed rule a requirement that the state validate, through state audits and/or reviews, each hospital's self-reported data related to costs and payments for the uninsured, but decided not to proceed with this option at this time. A separate workgroup, created by Senate Bill 10, is reviewing the issue and will make recommendations to HHSC.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that for each of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is the standardization and clarification of the administrative rules governing DSH funding for non-state owned hospitals. The proposed changes to the rule also further Medicaid reform efforts.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Henry Welles, Rate Analyst for Hospital Acute Care Services, by mail at HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, TX 78708-5200, by facsimile to (512) 491-1998, or by e-mail to Henry.Welles@hhsc.state.tx.us, within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for July 22, 2008, from 9 a.m. to 12:00 p.m. in the HHSC Lone Star Conference Room at 11209 Metric Boulevard, Austin, Texas 78758. Persons requiring further information, special assistance, or accommodations should contact Henry Welles at (512) 491-1368.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance (Medicaid) payments under Human Resources Code Chapter 32.

The proposed amendment affects Texas Government Code Chapter 531 and Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.8065. Additional Reimbursement to Disproportionate Share Hospitals.

(a) Introduction. Hospitals participating in the Texas Medical Assistance (Medicaid) program that meet the conditions of participation and that serve a disproportionate share of low-income patients are eligible for additional reimbursement from the disproportionate share hospital (DSH) fund. DSH funds are available only to an entity licensed as a hospital by the state. HHSC [~~The single state agency~~] or its designee shall establish each hospital's eligibility for and amount of reimbursement as specified in this section. For purposes of Medicaid disproportionate share eligibility determination, a multi-site hospital is considered as one provider unless it has separate Medicaid cost reports for each site. Each year, HHSC will mail a DSH application packet to all active Medicaid hospitals. The application packet may request self-reported data HHSC deems necessary to supplement the AHA/THA/DSHS annual hospital survey and the fiscal intermediary data. A hospital may apply for DSH funds annually by completing the application packet by the deadline specified by HHSC in the packet's cover letter. A hospital that fails to submit a complete application by the deadline specified by HHSC will not be eligible to receive DSH funds that year. This section applies to all hospitals that participate in the DSH program other than state-owned teaching hospitals, whose DSH requirements are outlined in §355.8067 of this title (relating to Disproportionate Share Hospital Reimbursement Methodology

for State-Owned Teaching Hospitals) [To verify data referred to in this section, hospitals must allow state personnel access to the hospital and its records].

(b) Definitions. For purposes of this section, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adjudicated--A hospital claim that is approved or denied for payment by HHSC or its designee, or another payer in the case of non-HHSC programs.

(2) [(1)] Adjusted hospital specific limit--A hospital specific limit trended forward to account for an inflation update factor since the base year.

[(2) Bad debt charges--Uncollectible inpatient and outpatient charges that result from the extension of credit.]

(3) Charity care--The unreimbursed cost to a hospital of providing, funding, or otherwise financially supporting health care services on an inpatient or outpatient basis to a person classified by the hospital as financially or medically indigent or providing, funding, or otherwise financially supporting health care services provided to financially indigent patients through other nonprofit or public outpatient clinics, hospitals, or health care organizations.

(4) Charity charges--Total amount of hospital charges for inpatient and outpatient services attributed to charity care in a hospital fiscal year. These charges do not include bad debt charges, contractual allowances or discounts (other than for indigent patients not eligible for medical assistance under the approved Medicaid state plan); that is, reductions or discounts in charges given to other third party payers such as, but not limited to, health care maintenance organizations, Medicare or Blue Cross. The amount of total charity charges must be consistent with the amount reported on the Department of State Health Services (DSHS) annual hospital survey.

(5) Cost of services to uninsured patients--Inpatient and outpatient charges to patients who have no health insurance or other source of third party payment for services provided during the year, multiplied by the hospital's ratio of costs to charges (inpatient and outpatient), less the amount of payments made by or on behalf of those patients. Uninsured patients are patients who have no health insurance or other source of third party payments for services provided during the year. Uninsured patients include those patients who do not possess health insurance that would apply to the service for which the individual sought treatment.

(6) Cost-to-charge ratio (inpatient only)--Total adjudicated inpatient charges for each hospital from all payers, which are converted to cost by dividing the total cost by the total gross patient charges. The cost-to-charge ratio is an all-payer ratio that covers all applicable hospital costs and charges relating to patient care. This ratio does not distinguish between payer types such as Medicare, Medicaid or private pay. [Hospital's overall inpatient cost-to-charge ratio, as determined from its Medicaid cost report it submitted for its fiscal year ending in the previous calendar year. The latest available Medicaid cost report will be used in the absence of the cost report for the hospital fiscal year ending in the previous calendar year.]

(7) Cost-to-charge ratio (inpatient and outpatient)--Total adjudicated inpatient and outpatient charges for each hospital from all payers, which are converted to cost by dividing the total cost by the total gross patient charges. The cost-to-charge ratio is an all-payer ratio that covers all applicable hospital costs and charges relating to patient care. This ratio does not distinguish between payer types such as Medicare, Medicaid or private pay. [Hospital's overall cost-to-charge ratio, as determined from its Medicaid cost report it submitted for its fiscal year ending in the previous calendar year. The latest available Medicaid cost report will be used in the absence of the cost report for the hospital fiscal year ending in the previous calendar year.]

(8) Financially indigent--An uninsured or underinsured person who is accepted for care with no obligation or a discounted obligation to pay for the services rendered based on the hospital's eligibility system.

(9) Gross inpatient revenue--Amount of gross inpatient revenue (charges) reported by the hospital in the appropriate part of the Medicaid cost report it submitted for its fiscal year ending in the previous calendar year. Gross inpatient revenue excludes revenue related to the professional services of hospital-based physicians, swing bed facilities, skilled nursing facilities, intermediate care facilities, and other revenue that is unidentified. The latest available Medicaid cost report will be used in the absence of the cost report for the hospital fiscal year ending in the previous calendar year.

(10) Hospital eligibility criteria--The financial criteria used by a hospital to determine if a patient is eligible for charity care. The system includes income levels and means testing indexed to the federal poverty guidelines; provided, however that a hospital may not establish an eligibility system that sets the income level eligible for charity care lower than that required by counties under the Texas Health and Safety Code, §61.023, or higher, in the case of the financially indigent, than 200 percent [%] of the federal poverty guidelines. A hospital may determine that a person is financially or medically indigent pursuant to the hospital's eligibility system after health care services are provided.

(11) Hospital specific limit--The sum of the following two measurements:

(A) the Medicaid shortfall; and

(B) cost of services to uninsured patients.

(12) Inflation update factor--HHSC [The commission] or its designee applies a cost of living index to a hospital's unreimbursed Medicaid costs and its cost of treating uninsured patients based on the Centers for Medicare and Medicaid Services (CMS) Prospective Payment System Hospital Market Basket Index. [The index used is the greater of:]

[(A) the Centers for Medicare and Medicaid Services (CMS) Market Basket Forecast (PPS Hospital Input Price Index) based on the report issued for the federal fiscal year quarter ending in March of each year, adjusted for the state fiscal year by summing one-third of the annual forecasted rate of the index for the current calendar year and two-thirds of the annual forecasted rate of the index for the next calendar year; or]

[(B) an amount determined by selecting the lesser of the following two measures:]

[(i) the change in total charges per case for the latest year available compared to total charges per case for the previous year; or]

[(ii) the change in the Texas medical consumer price index-urban (that is, the arithmetic mean of the Houston and Dallas/Fort Worth medical consumer price indices for urban consumers) for the latest year available compared to the Texas medical consumer price index-urban for the previous year.]

(13) Low-income days--Number of days derived by multiplying a hospital's total inpatient census days by its low-income utilization rate.

(14) Low-income utilization rate--The result of the following computation: ((Title XIX inpatient hospital payments plus inpatient

payments received from state and local governments) divided by (gross inpatient revenue multiplied by cost-to-charge ratio)) plus ((total inpatient charity charges minus inpatient payments received from state and local governments) divided by (gross inpatient revenue)).

(15) Medicaid inpatient utilization rate--Fraction expressed as a percentage, the numerator of which is the hospital's number of inpatient days attributable to patients who (for these days) were eligible for medical assistance under the Medicaid [~~a~~] state plan, and the denominator of which is the total number of the hospital's inpatient days in that period. The term "inpatient day" includes each day in which an individual (including a newborn) is an inpatient in the hospital, whether or not the individual is in a specialized ward and whether or not the individual remains in the hospital for lack of suitable placement elsewhere.

(16) Medicaid shortfall--The cost of services (inpatient and outpatient) furnished to Medicaid patients, less the amount paid under the non-disproportionate [~~nondisproportionate~~] share hospital payment method under the state plan.

(17) Medically indigent--A person whose medical or hospital bills after payment by third-party payers exceed a specified percentage of the patient's annual gross income, determined in accordance with the hospital's eligibility system, and the person is financially unable to pay the remaining bill.

(18) Medicare inpatient utilization rate--Medicare inpatient days divided by total inpatient census days.

(19) Payments received--Payments received from uninsured patients from or on behalf of uninsured patients as defined in paragraph (5) of this subsection.

(20) Rural area--Area outside a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA). MSA and PMSA are defined by the United States Office of Management and Budget.

(21) Total inpatient census days--Total number of a hospital's inpatient census days during its fiscal year ending in the previous calendar year.

(22) Total inpatient charity charges--Total amount (excluding bad debt charges) of the hospital's charges for inpatient hospital services attributed to charity care (care provided to individuals who have no source of payment, third-party or personal resources) in a cost reporting period. The total inpatient charges attributable to charity care does not include contractual allowances and discounts (other than for indigent patients not eligible for medical assistance under an approved Medicaid State Plan); that is, reduction or discounts, in charges given to other third-party payers such as but not limited to HMOs, Medicare, or Blue Cross. The amount of total inpatient charity charges must be consistent with the amount reported on HHSC [~~the commission~~] or its designee's annual hospital survey.

(23) Total Medicaid inpatient days--Total number of Title XIX inpatient days based on the latest available state fiscal year adjudicated claims data for patients eligible for Title XIX benefits. The term excludes days for patients who are covered for services which are fully or partially reimbursable by Medicare. The term includes Medicaid-eligible days of care adjudicated by [~~billed to~~] managed care organizations. Total Medicaid inpatient days includes days that were denied payment for reasons other than eligibility. [~~Included are inpatient days of care provided to patients eligible for Medicaid at the time the service was provided, regardless of whether the claim was filed or paid. These denied claims include, but are not limited to, claims for patients whose spell of illness limits are exhausted, or claims that were filed late.~~] The term excludes days attributable to Medicaid patients between the ages of 21 and 65 who live in an institution for mental diseases. The term includes adjudicated days attributable to individuals eligible for Medicaid in other states. Total Medicaid inpatient days includes days with adjudicated dates [~~of admissions~~] between September 1 and August 31 (state fiscal year) [~~and claims finalized dates within the fiscal year and for nine months after the end of the fiscal year (May 31)~~].

(24) Total Medicaid inpatient hospital payments--Total amount of Title XIX funds, excluding Medicaid disproportionate share funds, a hospital received for adjudicated claims [~~admissions~~] during the latest available state fiscal year for inpatient services. The term includes dollars received by a hospital for inpatient services from managed care organizations. The term includes Medicaid inpatient payments received by a hospital for patients eligible for Medicaid in other states. Total Medicaid inpatient hospital payments includes payments associated with adjudicated claims [~~dates of admissions~~] between September 1 and August 31 (state fiscal year) [~~and dates of payments within the fiscal year and for nine months after the end of the fiscal year (May 31)~~].

(25) Total operating costs--Total operating costs of a hospital during its fiscal year ending in the calendar year before the start of the current federal fiscal year, according to the hospital's Medicaid cost report (tentative, or final audited cost report, if available).

(26) Total state and local revenue--Total amount of state and local payments a hospital received for inpatient care, excluding all Title XIX payments, during its fiscal year ending in the previous calendar year including, [~~. Sources of state and local payments include~~] but [~~are~~] not limited to, County Indigent Health Care, Children with Special Health Care Needs, Kidney Health Care, Children's Health Insurance Program (CHIP) payments that are funded entirely with state general revenue, and tax funds. Payment sources containing federal dollars are not to be included in state and local payments. These sources include, but are not limited to: Children's Health Insurance Program (CHIP) payments funded under Title XXI, Substance Abuse and Mental Health Services Administration, Ryan White Title I, Ryan White Title II, Ryan White Title III, and TRICARE Foundation Health, Medicare, and Medicare/Medicaid contractual funds and allowances. HHSC [~~The commission~~] or its designee adjusts tax dollars for hospitals that report all or none of their tax dollars received as inpatient tax dollars. To make adjustments, HHSC [~~the commission~~] or its designee uses the appropriate parts of the latest available Medicaid cost report in the absence of the cost report for the hospital fiscal year ending in the previous calendar year [~~Medicaid cost report that the hospital submitted for its fiscal year ending in the previous calendar year~~].

(27) Urban--Area inside an MSA or PMSA.

(28) Weighted low-income days--Low-income days multiplied by an appropriate weighing factor.

(29) Weighted Medicaid days--Medicaid days multiplied by an appropriate weighing factor.

[~~(30) Available fund (state mental and chest hospitals)--Sum of 100% of their adjusted hospital specific limits.~~]

[~~(31) Available fund (hospitals other than mental and chest hospitals)--Total federal fiscal year cap (state disproportionate share hospital allotment) minus the available fund for state teaching hospitals minus the available fund for state mental and chest hospitals.~~]

(c) Conditions of participation. Before the beginning of each federal [~~state~~] fiscal year, which begins October 1, HHSC [~~September 1, the single state agency~~] or its designee shall survey Medicaid hospitals to determine which hospitals meet the state's conditions of participation. [~~Hospitals must allow state personnel access to the hospital and its records to ensure compliance with the conditions of participa-~~

tion. Failure to meet all of the conditions of participation shall result in ineligibility for participation in the program These conditions of participation do not apply to state-owned teaching hospitals as specified in §355.8067 of this title (relating to Disproportionate Share Hospital Reimbursement Methodology for State-Owned Teaching Hospitals). The conditions of participation are as follows.]

[(1) Hospital eligibility criteria for indigent patients needing medical care. Each Medicaid hospital must submit to the state Medicaid director its hospital eligibility criteria for indigent patients and the procedures for identifying those indigent patients eligible for emergency and nonemergency medical care. Hospital eligibility criteria should address financially indigent people as well as the medically indigent and are indexed to the federal poverty guidelines. Hospitals must identify the number of patients to whom they provide charity care and must make available to state personnel sufficient records to document the amount of charity care provided to those patients. A hospital must allow state personnel to observe the implementation of its stated charity policy and must permit state personnel access to the hospital or its records evidencing charity care. Exception: State mental hospitals and state chest hospitals are exempt. Indigent care criteria for these hospitals are defined in state law.]

[(2) Charity charge requirements. Exceptions: Urban hospitals with combined Medicaid and Medicare inpatient utilization rates equal to or greater than 80% are exempt. Rural and children's hospitals with combined Medicare and Medicaid inpatient utilization rates equal to or greater than 65% are exempt. Any hospital that qualifies for Medicaid disproportionate share funds in a state fiscal year, and that did not get Medicaid disproportionate share funds in the previous year, is exempt from this specific condition. State mental hospitals and state chest hospitals are exempt. The ratio of a hospital's total inpatient and outpatient charity charges of a hospital fiscal year must be equal to or greater than 25% of its net disproportionate share payments received in the next state fiscal year.]

[(3) Posting requirements. Each hospital must annually provide assurances to the state Medicaid director that it posts policies informing patients and prospective patients of its eligibility and charity care. These policies must be posted prominently and continuously in common, patient-entry points. Hospitals must advise all patients of the availability of no-cost medical care and the application procedures. The posting must be in English and Spanish.]

[(4) Reporting requirements. Each hospital must report receipt and expenditure of Medicaid disproportionate share funds to the commission or its designee at least once a year. Each hospital must maintain records for the receipt and expenditure of its disproportionate share funds for five years.]

[(5) Community health care assessment. Each hospital, or group of hospitals, must annually furnish to the commission or its designee a copy, developed at the direction of the hospital's governing board, of its assessment of the health care needs of its community. The assessment must contain a socioeconomic and demographic description of the hospital's service area and an assessment of the service area's existing health care resources. The assessment must demonstrate how the hospital is using its disproportionate share funds to address its community health needs. Exceptions: State mental hospitals and state chest hospitals are exempt because their expenditures are governed by state law.]

[(6) Alternative access to primary care. Each hospital must annually report to the commission or its designee the availability of alternative access (other than emergency care) to primary care in its community. Alternative access to primary care includes, but is not limited to, primary care physician offices, minor emergency centers, and primary care clinics. Hospitals must have plans to arrange for nonemergency patients to receive care that is not in their emergency rooms, unless they can demonstrate that there is no feasible alternative in the community. This kind of plan includes, but is not limited to, a hospital-based clinic for nonemergent patients referred to after triage. Hospitals also must report their progress in treating nonemergency patients apart from their emergency rooms. Exceptions: The following hospitals are exempt from this condition: State mental and state chest hospitals; psychiatric hospitals licensed by the Department of State Health Services (DSHS); and certain hospitals licensed as "special" by the DSHS (i.e., long-term care hospitals, ventilator hospitals, burn institutes, and alcohol-chemical dependency hospitals); rehabilitation hospitals; maternity hospitals; college infirmaries; contagious disease hospitals; and hospitals for the terminally ill.]

(1) [(7)] Trauma system. Disproportionate share hospitals must actively participate in the development of a regional trauma system, which includes obtaining trauma facility designation as defined in the state trauma laws (Health and Safety Code, §§773.111 - 773.120) and Department of State Health Services (DSHS) rules. This condition shall apply only if rules and procedures to designate trauma facilities have been adopted. Exceptions: The following hospitals are exempt from the trauma system condition: State mental and state chest hospitals; psychiatric hospitals licensed by DSHS; and certain hospitals licensed as "special" by DSHS (i.e., long term care hospitals, ventilator hospitals, burn institutes, and alcohol-chemical dependency hospitals); rehabilitation hospitals; maternity hospitals; college infirmaries; contagious disease hospitals; and hospitals for the terminally ill.

(A) Hospitals qualifying for the disproportionate share program for the first time must meet the regional trauma system development participation requirement in the first year of their participation in the disproportionate share program, regional trauma system development participation and application for trauma facility designation in the second year of their participation in the disproportionate share program, regional trauma system development participation and confirmation that a consultation survey has been scheduled or a complete designation application packet has been submitted to the Office of EMS/Trauma Systems Coordination in the third year of their participation in the disproportionate share program, regional trauma system development participation and confirmation that a verification or designation survey has been scheduled in the fourth year of their participation in the disproportionate share program and continued participation and completed verification or designation survey in the fifth year of their participation in the disproportionate share program, continued participation and trauma facility designation in the sixth year of their participation in the disproportionate share program, and continued participation and maintenance of trauma facility designation in their subsequent years of participation in the disproportionate share program. By March 1 of each year, the Office of EMS/Trauma Systems Coordination reports hospital participation in regional trauma system development, application for trauma facility designation, and trauma facility designation status to the disproportionate share program.

(B) Hospitals shall be designated as trauma facilities under four levels that range from "basic" (stabilization and transfer of major and severe trauma patients) to "comprehensive" (care and management of all trauma patients, plus education and research).

(2) [(8)] Maintenance of effort. Hospital districts and city/county hospitals with greater than 250 licensed beds in the state's largest MSAs and PMSAs are not eligible for disproportionate share payments if local revenues are reduced as a result of disproportionate share funds received. MSAs with populations greater than or equal to 121,000, according to the most recent decennial census, are considered "the largest MSAs."

(3) [~~(9)~~] Two-physician requirement. In order to qualify for disproportionate share hospital payments, each hospital must have at least two physicians (M.D. or D.O.) who have hospital staff privileges and who have agreed to provide non-emergency obstetrical services to Medicaid recipients. The two-physician requirement does not apply to hospitals whose inpatients are predominantly under 18 years old or that did not offer nonemergency obstetrical services as of December 22, 1987.

(4) Each hospital must have a Medicaid inpatient utilization rate of at least one percent.

(5) A hospital eligible for DSH reimbursement must allow HHSC or its designee to have access to its hospital records and accounting systems during regular business hours.

(d) Qualifying formulas for determining disproportionate share status. HHSC will use the following formulas to [~~Each hospital must have a Medicaid inpatient utilization rate, at a minimum, of 1.0%. The single state agency or its designee shall~~] identify the qualifying Medicaid disproportionate share providers from among the hospitals that meet the two-physician requirement and the state's other conditions of participation[~~, as specified~~] in subsection (c) [~~(1) - (9)~~] of this section[~~, by using the following formulas~~]. In the case of hospitals that have merged to form a single Medicaid provider, HHSC [~~the single state agency~~] or its designee will [~~shall~~] aggregate the data points from the individual hospitals that now make up the single provider to determine whether the single Medicaid provider qualifies as a Medicaid disproportionate share hospital. Medicaid disproportionate share hospitals will [~~shall~~] receive payments if they merge with other hospitals during the fiscal year, if they continue to meet the conditions of participation in subsection (c) of this section, [~~two-physician requirement, and if they meet the other conditions of participation~~]. Children's hospitals that do not otherwise qualify as disproportionate share hospitals will [~~shall~~] be deemed disproportionate share hospitals. The formulas are as follows:

(1) a Medicaid inpatient utilization rate at least one standard deviation above the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program: Title XIX Inpatient Days/Total Inpatient Census Days;

(2) for rural hospitals, a Medicaid inpatient utilization rate greater than the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program; or

(3) a low-income utilization rate exceeding 25 percent [~~%~~] but not more than 100 percent [~~%~~]. For a hospital, the low-income utilization rate is the sum (expressed as a percentage) of the fractions calculated as follows:

(A) the total Medicaid inpatient payments [~~paid to the hospital,~~] plus the total state and local revenue paid to the hospital [~~amount of payments received directly from state and local governments for inpatient hospital care, excluding all Title XIX payments~~], in a hospital's [~~hospital~~] fiscal year, divided by a hospital's gross inpatient revenue multiplied by the hospital's inpatient-only cost-to-charge ratio for the same cost-reporting period: (Title XIX Inpatient Hospital Payments + Total State and Local Revenue)/(Gross Inpatient Revenue x Cost to Charge Ratio).

(B) the total amount of the hospital's charges for inpatient hospital services attributable to charity care (care provided to individuals who have no source of payment, third-party or personal resources), excluding bad debt charges, in a cost reporting period, minus the amount of payments for inpatient hospital services received directly from state and local governments, excluding all Title XIX payments, in a hospital fiscal year, divided by the total amount of the hospital's charges for inpatient services in the hospital in the same period. The total inpatient charges attributable to charity care will not include contractual allowances and discounts (other than for indigent patients not eligible for medical assistance under an approved Medicaid state plan); that is, reductions or discounts in charges given to other third-party payers such as but not limited to HMOs, Medicare, or Blue Cross: (Total Inpatient Charity Charges - Total State and Local Payments)/Gross Inpatient Revenue.

(4) Total Medicaid inpatient days at least one standard deviation above the mean Medicaid inpatient days for all hospitals participating in the Medicaid program.

(5) Total Medicaid inpatient days at least 70 [~~75~~] percent of a figure calculated by adding the mean Medicaid inpatient days plus one standard deviation above the mean Medicaid inpatient days, for all hospitals[~~,~~] participating in the Medicaid program[~~,~~] in urban counties with populations of 250,000 persons or less, according to the most recent decennial census.

(e) Determining disproportionate share status. To determine Medicaid disproportionate share status:

(1) HHSC [~~the single state agency~~] arrays each hospital's Medicaid utilization rate in descending order. HHSC [~~The single state agency~~] first selects hospitals [~~meeting the two-physician requirement or one of the exceptions to the requirement~~] whose Medicaid utilization rates are at least one standard deviation above the mean Medicaid inpatient utilization rate for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals;

(2) HHSC [~~the single state agency~~] arrays each rural hospital's Medicaid utilization rate in descending order. HHSC [~~The single state agency~~] then selects rural hospitals [~~meeting the two-physician requirement or one of the exceptions to the requirement~~] whose Medicaid utilization rate is above the mean Medicaid utilization rate for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals;

(3) HHSC [~~the single state agency~~] then arrays each remaining hospital's low income utilization rate in descending order. HHSC [~~The single state agency~~] selects hospitals [~~meeting the two-physician requirement or one of the exceptions to the requirement~~] whose low income utilization rates are greater than 25 percent [~~%~~]. The state considers these hospitals to be Medicaid disproportionate share hospitals;

(4) HHSC [~~the single state agency~~] arrays each remaining hospital's total Medicaid inpatient days in descending order. HHSC [~~The single state agency~~] selects hospitals [~~meeting the two-physician requirement or one of the exceptions to the requirement~~] whose total inpatient Medicaid days is at least one standard deviation above the mean Medicaid inpatient days for all hospitals participating in the Medicaid program. The state considers these hospitals to be Medicaid disproportionate share hospitals.

(5) HHSC [~~the single state agency~~] arrays each remaining hospital's total Medicaid inpatient days in descending order. HHSC [~~The single state agency~~] selects hospitals, located in urban counties with populations of 250,000 persons or less, [~~meeting the two-physician requirement or one of the exceptions to the requirement,~~] whose total Medicaid inpatient days is at least 70 [~~75~~] percent of a figure calculated by adding the mean Medicaid inpatient days plus one standard deviation above the mean Medicaid inpatient days, [~~one standard deviation above the mean Medicaid inpatient days~~] for all hospitals participating in the Medicaid program in urban counties of 250,000 persons

or less, according to the most recent decennial census. The state considers these hospitals to be Medicaid disproportionate share hospitals.

(f) Reimbursing Medicaid disproportionate share hospitals. HHSC [~~The commission~~] shall reimburse Medicaid disproportionate share hospitals on a monthly basis. Monthly payments will equal one twelfth of annual payments unless it is necessary to adjust the amount because payments will not be made for a full 12-month period, to comply with the annual state disproportionate share hospital allotment, or to comply with other state or federal disproportionate share hospital program requirements. Before the start of the next federal [~~state~~] fiscal year, HHSC [~~the commission~~] determines the size of the available funds to reimburse disproportionate share hospitals for the next federal [~~state~~] fiscal year, which begins each October [~~September~~] 1.

(1) The funds available to reimburse the state chest hospitals [~~and state mental hospitals~~] equal the total of their adjusted hospital specific limits. The DSH funds available to reimburse state institutes for mental disease (IMDs) are equal to the total of their adjusted hospital specific limit within available DSH funds. If sufficient DSH funds are not available to fully fund adjusted hospital specific limits, then each hospital's funding is adjusted within the DSH funds available under federal law. After DSH funds have been allocated to state chest hospitals and state IMDs, the remaining DSH funds are available for allocation to other qualifying hospitals. The available DSH funds [~~fund~~] for the remaining hospitals equal [~~equals~~] the lesser of the funds remaining in the state's annual disproportionate share allotment or the sum of qualifying hospitals' adjusted hospital specific limits.

(2) If HHSC obtains a federal waiver under Section 1115 of the Social Security Act to implement the Medicaid reform provisions in Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund:

(A) HHSC will subtract from the amount of aggregate DSH funds in a federal fiscal year and subsequent years the estimated aggregate dollar value increase in hospital payments resulting from an increase in Medicaid inpatient or outpatient hospital payment rates for non-state DSH providers approved during the federal fiscal year, if needed to implement the Texas Health Opportunity Pool Trust Fund for the duration of the waiver.

(B) The adjustment prescribed by this subparagraph does not apply to:

(i) a children's hospital,

(ii) an institute for mental disease (IMD),

(iii) a hospital located in a county with 50,000 or fewer persons,

(iv) a hospital that is a Medicare-designated Rural Referral Center (RRC) or Sole Community Hospital (SCH) that is not located in a Metropolitan Statistical Area (MSA) as defined by the U.S. Office of Management and Budget, or

(v) a hospital that is a Medicare-designated Critical Access Hospital (CAH).

(3) Payments for state chest hospitals and state institutes for mental disease (IMDs) are [~~shall be~~] made in the following manner, unless HHSC [~~the commission~~] determines the hospital's proposed reimbursement has exceeded its specific limit.

(A) [~~(1)~~] A state chest hospital that meets the requirements for disproportionate share status and provides inpatient hospital services receives annually up to 100 [~~175~~] percent of its adjusted hospital specific limit.

(B) A state IMD [~~mental hospital~~] that meets the requirements of disproportionate share status and provides inpatient psychiatric services receives up to 100 percent of its adjusted hospital specific limit within available DSH funds. If sufficient DSH funds are not available to fully fund adjusted hospital specific limits, then each hospital's funding is adjusted pro rata within the DSH funds available under federal law. Aggregate payments made to IMD facilities statewide are subject to federally mandated reimbursement limits.

(4) [~~(2)~~] Payments for the remaining hospitals will be made in the following manner, unless HHSC determines the hospital's proposed reimbursement has exceeded its specific limit. Payments [~~For the remaining hospitals, payments~~] will be made based on both weighted inpatient Medicaid days and weighted low-income days. HHSC [~~The commission~~] weights each hospital's total inpatient Medicaid days and low-income days by the appropriate weighting factor. HHSC [~~The commission~~] defines a low-income day as a day derived by multiplying a hospital's total inpatient census days from its fiscal year ending the previous calendar year by its low-income utilization rate. Hospital districts and city/county hospitals with greater than 250 licensed beds in the state's largest MSAs shall receive weights based proportionally on the MSA population according to the most recent decennial census. MSAs with populations greater than or equal to 121,000, according to the most recent decennial census, are considered "the largest MSAs." Children's hospitals also shall receive weights because of the special nature of the services they provide. All other hospitals receive weighting factors of 1.0. The inpatient Medicaid days of each hospital shall be based on the latest available state fiscal year data for patients entitled to Title XIX benefits. The available fund shall be divided into two parts. One half of the available fund will reimburse each qualifying hospital by its percent of the total inpatient Medicaid days. One-half of the available fund will reimburse each qualifying hospital by its percent of low income days. HHSC [~~The commission~~] determines whether hospitals in rural areas will receive 5.5 percent [~~%~~] or more of the gross disproportionate share hospital funds for non-state hospitals. If hospitals in rural areas will receive at least 5.5 percent [~~%~~] of the gross non-state hospital funds, HHSC [~~the commission~~] will reimburse them using existing principles. If hospitals in rural areas will not receive at least 5.5 percent [~~%~~] of non-state hospital funds, HHSC [~~the commission~~] will reimburse them at 5.5 percent of non-state hospital funds, using existing principles. Reimbursement for the remaining hospitals is determined as follows:

(A) HHSC [~~The single state agency~~] or its designee determines the average monthly number of weighted Medicaid inpatient days and weighted low-income days of each qualifying hospital.

(B) A qualifying hospital receives a monthly disproportionate share payment based on the following formula:
Figure: 1 TAC §355.8065(f)(4)(B)
[~~Figure: 1 TAC §355.8065(f)(2)(B)~~]

(C) All MSA population data are from the most recent decennial census. The specific weights for certain hospital districts and children's hospitals are as follows:

(i) Children's hospitals are weighted at 1.25.

(ii) MSAs with populations greater than or equal to 121,000 and less than 300,000 are weighted at 1.05 [~~2.75~~].

(iii) MSAs with populations greater than or equal to 300,000 and less than 1,000,000 are weighted at 1.30 [~~3.0~~].

(iv) MSAs with populations greater than or equal to 1,000,000 and less than 3,000,000 are weighted at 1.55 [~~3.25~~].

(v) MSAs with populations greater than or equal to 3,000,000 are weighted at 2.05 [~~3.75~~].

(vi) HHSC may change the weights as needed in the DSH program to address changes in program size.

[(D) For state fiscal year 2008 (September 1, 2007 through August 31, 2008), and state fiscal year 2009 (September 1, 2008 through August 31, 2009), the monthly disproportionate share payment calculated under subparagraph (C) of this paragraph is subject to a conversion factor that is applied as follows:]

[(i) A conversion factor of 1.11 is applied to payments made to hospital districts located in MSAs with populations greater than 3 million.]

[(ii) A conversion factor of 1.02 is applied to payments made to hospital districts located in MSAs with populations between 1 and 3 million.]

[(iii) A conversion factor of .96 is applied to payments made to children's hospitals.]

[(iv) A conversion factor of .92 is applied to payments made to private, urban, general hospitals located in a MSA.]

[(v) A conversion factor of 1.0 is applied to payments made to all other hospitals.]

[(vi) For purposes of this section, a private, urban, general hospital is defined as a hospital that is not operated by a political subdivision of the state, is not licensed under Chapter 577, Health and Safety Code, to provide mental health services or is not exempted from the Medicare and Medicaid prospective payment systems as a children's hospital, and is eligible for additional reimbursement from the disproportionate share hospital fund.]

(D) [(E)] HHSC [The commission] or its designee determines the hospital specific limit for each disproportionate share hospital. This limit is the sum of a hospital's Medicaid shortfall, as defined in subsection (b)(16) of this section, and its cost of services to uninsured patients, as defined in subsection (b)(5) of this section, multiplied by the appropriate inflation update factor, as provided for in subparagraph (E) of this subsection. If HHSC or its designee determines that a hospital's Medicaid payments exceed its Medicaid costs, HHSC will reduce the hospital's cost of uninsured patients in the year the DSH payment is made by the amount of the overage [subsection (g)(2)(E) of this section].

(i) The Medicaid shortfall includes total Medicaid [billed] charges related to adjudicated claims and any Medicaid payment made for the corresponding inpatient and outpatient services delivered to Texas Medicaid clients, as determined from the hospital's fiscal year claims data, regardless of whether the claim was paid. These denied claims include, but are not limited to, patients whose spell of illness claims were exhausted, or payments were denied due to late filing. See subsection (b)(16) of this section for definition of "Medicaid shortfall."

(ii) The total Medicaid [billed] charges related to adjudicated claims for each hospital are converted to cost, utilizing a calculated cost-to-charge ratio (inpatient and outpatient). HHSC [The commission] or its designee determines that ratio by using the hospital's CMS Form [HCFA] 2552, Hospital and Hospital Health Care Complex Cost Report, that was submitted for the fiscal year ending in the previous calendar year. HHSC [The commission] or its designee uses the latest available Medicaid cost report in the absence of the Medicaid cost report submitted in the fiscal year ending in the previous calendar year. To determine the cost-to-charge ratio (inpatient and outpatient) for each hospital, HHSC [the commission] or its designee uses the total cost from the CMS Form [HCFA] 2552, Worksheet B, Part I, Column 25, and total charges from the CMS Form [HCFA] 2552, Worksheet C, Part I, Column 8. The ratio is the total cost divided by the total gross patient charges. The cost-to-charge ratio is an all-payer ratio. HHSC removes from the calculation of the cost-to-charge ratio non-hospital services including, but not limited to, ambulance, rural health clinics, primary home care, home health agencies, hospice, skilled nursing facilities, and residential treatment centers.

(iii) HHSC [The commission] or its designee determines the cost of services to patients who have no health insurance or source of third party payments for services provided during the fiscal year for each hospital. Hospitals are surveyed each year to determine charges that can be attributed to patients without insurance or other third party resources. Hospitals must not include unreimbursable cost centers listed on the CMS Form 2552, Schedule B, Part I, Column 25, Lines 96 through 100. The charges from reporting hospitals are multiplied by each hospital's cost-to-charge ratio (inpatient and outpatient) to determine the cost. Hospitals that report on their annual DSH application charges for patients without health insurance or other source of third party payments, and payments made by or on behalf of those patients, must include adjustments to charges and payments received during the hospital's fiscal year and for five months after the end of the hospital's fiscal year.

(iv) After HHSC [the commission] or its designee determines each disproportionate share hospital's cost of services to patients who have no health insurance or source of third party payments for services provided during the year, HHSC [the commission] or its designee subtracts from each hospital's cost of services the amount of payments made by or on behalf of those patients who have no health insurance or source of third party payments for services provided during the year.

(E) [(F)] HHSC [The commission] or its designee shall trend each hospital's hospital specific limit using ["hospital specific limit" calculated from its historical base period cost report to the state's fiscal year DSH disproportionate share program. For hospitals without a full 12-month fiscal year cost report, the commission or its designee shall convert their costs to annualized hospital specific limits. The commission or its designee shall use] the inflation rates described in subsection (b)(11) [(b)(12)] of this section. HHSC [The commission] or its designee shall calculate the number of months from the mid-point of the hospital's cost reporting period to the mid-point of the federal [state] fiscal year DSH program. HHSC [disproportionate share program. The commission] or its designee shall then multiply the portion of the hospital's cost report year occurring in the federal [state] fiscal year by the inflation update factor used for each federal [state] fiscal year in the calculation of hospital reimbursement rates for each federal [state] fiscal year. The product of these calculations shall be multiplied by each hospital's hospital specific limit ["hospital specific limit"] to obtain each hospital's adjusted hospital specific limit. ["adjusted hospital specific limit."]

(F) [(G)] HHSC [The commission] or its designee compares the projected payment for each disproportionate share hospital, as determined by subsections (d) and (e) of this section, with its adjusted hospital specific limit, as determined by subparagraphs (D) and (E) [and (F)] of this paragraph. If the hospital's projected payment is greater than its adjusted hospital specific limit, HHSC [the commission] or its designee reduces the hospital's payment to its adjusted hospital specific limit.

(G) [(H)] If there are DSH [disproportionate share hospital] funds left in the available fund for the remaining hospitals, because some hospitals have had their DSH [disproportionate share hospital] payments reduced to their adjusted hospital specific limits, HHSC [the commission] or its designee distributes the excess funds according to the provisions in this section. For hospitals whose projected DSH

[~~disproportionate share hospital~~] payments are less than their adjusted hospital specific limits, HHSC [~~the commission~~] or its designee does the following:

(i) calculate the difference between its adjusted hospital specific limit and its projected disproportionate share hospital payment;

(ii) add all of the differences from clause (i) of this subparagraph;

(iii) calculate a ratio for each hospital by dividing the difference from clause (i) of this subparagraph by the sum for clause (ii) of this subparagraph; and

(iv) multiply the ratio from clause (iii) of this subparagraph by the remaining available fund. [~~Remaining Available Fund x~~]

(H) [~~(I)~~] Only those hospitals that are below their adjusted hospital specific limits are eligible to participate in this distribution. The DSH [~~disproportionate share hospital~~] funds remaining in the available fund are distributed to the hospitals that have not already reached their adjusted hospital specific limits. Each hospital's total disproportionate share payment (including the redistribution of excess funds) cannot exceed its adjusted hospital specific limit.

(g) Review of HHSC determination of eligibility and estimated payment amount. HHSC notifies a hospital of its tentative eligibility or ineligibility and estimated payment amount at the beginning of the federal fiscal year. A hospital that does not qualify or that contends the amount of payment is incorrect may request a review by the state in accordance with paragraph (1) of this subsection. Tentative eligibility determinations and estimated payment amounts for all hospitals may change depending on the outcome of the review.

(1) Except as specified in paragraph (4) of this subsection, a request for review must be submitted in writing to HHSC within 15 calendar days of the date of the notification of tentative eligibility or ineligibility. The request must contain specific documentation supporting its contention that HHSC made factual or calculation errors that, if corrected, would result in the hospital's qualifying for payments or receiving a higher payment amount. A hospital must submit additional documentation within 30 calendar days of the date of notification of tentative eligibility or ineligibility. The written request for review and all supporting documentation must be sent to the Director of Hospital Reimbursement, Rate Analysis Department of HHSC.

(2) The review is:

(A) limited to allegations of factual or calculation errors made by HHSC.

(B) supported by documentation submitted by the hospital or used by HHSC in making its original determination.

(C) solely a paper review and is not an adversarial hearing.

(3) HHSC makes a determination and notifies the hospital of the results of a review at the time of the first monthly payment. Any adjustments made as a result of a review will not exceed the limits of available DSH funds.

(4) No additional review is conducted after first monthly payments are made unless, at the time of the first monthly payments, HHSC gives a hospital its first notice that the hospital is ineligible for DSH funding. In that case, the hospital may then request a review in accordance with paragraph (1) of this subsection.

(5) A request for review may not be based on a hospital's claim that the data submitted to HHSC by the hospital or a fiscal intermediary is incorrect or incomplete. On or about April 1 of each year, HHSC sends each participating hospital a report of adjudicated data received from fiscal intermediaries reflecting the hospital's Medicaid days, Medicaid charges, and Medicaid payments during the relevant time period. A hospital may communicate directly with the fiscal intermediary to correct any data in that report that the hospital believes is inaccurate. The fiscal intermediary must submit a corrected report to HHSC by July 1 of each year for the corrected report to be considered.

(6) At the request of a hospital, HHSC will conduct administrative reviews in cases where a hospital and a fiscal intermediary cannot resolve differences in adjudicated data. HHSC will make the final determination in these cases.

[~~(g) Review of agency determination. The commission or its designee notified hospitals of their tentative eligibility or ineligibility and the estimated amount of payment before the beginning of the state fiscal year. Any hospital, including those hospitals that do not qualify or that contend the amount of payment is incorrect, is allowed to request a review by the state. The actual amount of payment also may vary if a successful review request by one or more hospitals necessitates an adjustment in the amount of payments to the other hospitals in the program. Because of the state's ongoing review of data elements used in the formulas before the first monthly payment, it is possible that a hospital may either gain or lose eligibility after receiving tentative notification, which would also affect payment amounts. The hospital's written request for a review must be made to commission or its designee and must be received within 10 business days after the hospital receives notification of its eligibility or ineligibility. The hospital's request must contain specific documentation supporting its contention that factual or calculation errors were made, which, if corrected, would result in the hospital qualifying for payments or receiving payment in a corrected amount. The state will accept documentation from hospitals seeking reviews for 30 business days after the hospital receives notification of its eligibility or ineligibility.~~]

[~~(1) The hospital's written request for a review must be made to the director of acute care services and must be received by the director within 10 business days after the hospital receives notification of its eligibility or ineligibility. The hospital's request must contain specific documentation supporting its contention that factual or calculation errors were made, which, if corrected, would result in the hospital qualifying for payments or receiving payment in a corrected amount.~~]

[~~(2) The review is:~~]

[~~(A) limited to allegations of factual or calculation errors;~~]

[~~(B) limited to a review of documentation submitted by the hospital or used by the single state agency or its designee in making its original determination; and~~]

[~~(C) not conducted as an adversary hearing.~~]

[~~(3) The commission or its designee conducts the review as quickly as possible and makes its decision before the first monthly payment is made for that fiscal year. Hospitals that have requested a review are notified of the results of the review at the time of the first monthly payment. Any adjustments made as a result of these reviews will not exceed the limits of available funds for implementing the applicable disproportionate share program. Once the first monthly payment is made, no additional review or appeal is available to hospitals, with one exception. If a hospital, receiving a tentative eligibility letter and not requesting a review, then receives a letter stating the hospital is now ineligible for DSH funding, that hospital may now request a review of~~

~~eligibility determination according to the terms of paragraph (1) of this subsection.]~~

(h) Disproportionate share funds held in reserve.

(1) Hospitals participating in the disproportionate share program are required to comply at all times with the conditions of participation specified in subsection (c) of this section. If HHSC [~~the commission~~] or its designee has reason to believe that a hospital is not complying with the conditions of participation, HHSC [~~the commission~~] or its designee notifies the hospital of possible noncompliance. Upon receipt of the notice of possible noncompliance, the hospital has 30 days to demonstrate its compliance with conditions of participation. If the hospital fails to demonstrate its compliance within 30 days, HHSC [~~the commission~~] or its designee has the authority to hold that hospital's disproportionate share payments in reserve until the:

(A) hospital can demonstrate its compliance with the conditions of participation;

(B) decision to hold payments in reserve is reviewed and the decision results in favor of the hospital; or

(C) date the last monthly payment in the relevant federal [~~state~~] fiscal year occurs; whichever occurs first.

(2) If a hospital's disproportionate share payments are being held in reserve on the date of the last monthly payment in the federal [~~state~~] fiscal year, the amount of the payments is divided proportionately among the hospitals receiving a last monthly payment and is not restored to the hospital. If the hospital demonstrates its compliance with the conditions of participation or if the hospital receives a favorable review decision, the funds are restored to the hospital.

(3) Hospitals that have had disproportionate share payments held in reserve may request a review by HHSC [~~the single state agency~~] or its designee.

(A) The hospital's written request for a review must:

(i) be made to HHSC [~~the commission~~] or its designee;

(ii) be received by HHSC [~~the commission~~] or its designee within 10 days after the hospital's disproportionate share payments are held in reserve; and

(iii) contain specific documentation supporting its contention that it is in compliance with the conditions of participation.

(B) The review is:

(i) limited to allegations of compliance with conditions of participation;

(ii) limited to a review of documentation submitted by the hospital or used by HHSC [~~the commission~~] or its designee in making its original determination; and

(iii) not conducted as an adversary hearing.

(C) HHSC [~~The commission~~] or its designee conducts the review as quickly as possible and notifies hospitals requesting the review of the results. Once the last monthly payment for the relevant state fiscal year is made, no additional review or appeal is available to hospitals.

(4) If a hospital that is already receiving Medicaid disproportionate share funds closes, loses its license, loses its Medicare or Medicaid eligibility, that hospital's disproportionate share funds are reallocated among the remaining disproportionate share hospitals. If the hospital reopens, as the same hospital type, regains similar licensure or Medicare and Medicaid eligibility during the same fiscal year, that hospital receives monthly disproportionate share payments for the remaining months in the federal [~~state~~] fiscal year, as determined by the appropriate reimbursement formula and from available funds.

(i) Voluntary withdrawal from the DSH program. If HHSC obtains a federal waiver under Section 1115 of the Social Security Act to implement the Medicaid reform provisions in Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund:

(1) HHSC will recoup all DSH payments made during the same federal fiscal year to a hospital that voluntarily terminates its participation in the DSH program.

(2) HHSC will not redistribute to other hospitals under this division the amount of any recovered and non-reimbursed projected DSH funds.

(3) A hospital that voluntarily terminates from the DSH program will be ineligible to receive payments under this section for the next three consecutive federal fiscal years after the hospital's termination.

(4) If a hospital receives DSH funding in one federal fiscal year and does not apply for DSH funding in the following federal fiscal year, even though it would have qualified in that year, the amount of that hospital's DSH funding in the previous year will not be redistributed to other hospitals under this division.

(5) If a hospital does not apply for DSH funding in the federal fiscal year following a federal fiscal year in which it received DSH funding, even though it would have qualified for DSH funding in that year, the hospital will be ineligible to receive payments under this section for the next three consecutive federal fiscal years after the year in which it did not apply.

(j) Recovery of DSH funds. If a hospital receives an overpayment of DSH funds, including an overpayment that results from HHSC error or audit, HHSC will recoup such overpayment. Notwithstanding subsection (i) of this section, these funds will be redistributed to DSH providers that are eligible for additional payments subject to their hospital specific limits.

(k) All DSH payments are subject to the availability of appropriated state and federal funds.

~~[(i) Provision for reduction in federal disproportionate share cap. If the federal government reduces the amount of Medicaid disproportionate share funds allotted to Texas, the state must reduce the net amount allotted to each disproportionate share hospital during the state fiscal year by the same percentage.]~~

(l) [~~(j)~~] If a hospital is located in a county that is declared a federal natural disaster area, it may request that the state use the hospital's data, excluding data used to calculate the one percent Medicaid minimum utilization rate and the adjusted hospital specific limit, from the most recent year prior to the natural disaster for qualification and reimbursement purposes. This request must be submitted in writing to the state with the hospital's annual DSH application. The state reserves the right to approve or deny the written exception request and will notify the hospital of its decision prior to the beginning of the DSH program year. Hospitals may request an administrative review of the state's decision in this subsection. The review will be conducted under the provisions of subsection (g) of this section.

(m) Audit process. HHSC or its designee will audit periodically DSH providers. HHSC will determine the number of hospitals that will be audited on site and that will undergo desk reviews. HHSC will use statistically valid methods to determine the sample size of information for auditing or desk review.

(n) Failure to provide supporting documentation. HHSC or its designee will exclude data from calculations under this section if a hospital fails to maintain and provide adequate documentation to support that data.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803281
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 424-6586

♦ ♦ ♦

1 TAC §355.8067

The Health and Human Services Commission (HHSC) proposes an amendment to §355.8067, concerning the disproportionate share hospital reimbursement methodology for state-owned teaching hospitals.

Background and Justification

The proposed amendments revise the Medicaid disproportionate share hospital (DSH) reimbursement methodology for state-owned teaching hospitals. These changes clarify current practices as well as make changes to the processes used to determine, review, and audit DSH payments.

The proposed amendments to §355.8067 fall into three categories. First, most of the rule changes reflect efforts to more equitably distribute federal DSH funds among Texas hospitals. Since there is a set amount of aggregate DSH money available to Texas hospitals, if one hospital receives more DSH money, other hospitals receive less. HHSC proposes to standardize a number of DSH program elements among hospitals participating in the DSH program to create consistent requirements for all hospitals.

Second, HHSC has given certain assurances to the Centers for Medicare and Medicaid Services (CMS). After an audit by the federal Health and Human Services Office of Inspector General, HHSC agreed to add DSH rule language to codify its administrative practices relating to: calculating cost-to-charge ratios, handling Medicaid profits in calculating a hospital's Medicaid shortfall, and calculating uninsured costs.

Finally, the changes in subsection (j) relate to Medicaid reform initiatives at Chapter 531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund. HHSC submitted a Medicaid reform waiver request to CMS on April 16, 2008, with a comprehensive plan to transform health care in Texas by providing more people with insurance, reducing reliance on expensive emergency room visits for basic care, and making it easier for the working poor to buy into employer-sponsored health coverage. Under the conditions specified in this amendment, if a state-owned teaching hospital withdraws from the DSH program, HHSC will use its DSH funds to help finance the reform.

Section-by-Section Summary

The amendment in subsection (a) clarifies that a hospital must apply for DSH funds annually.

The amendments to subsection (b) set out the conditions for participation in the DSH program. The amendment adds a new requirement that a participating hospital must provide HHSC access to the hospital's records and accounting systems.

The amendments to subsection (c) clarify definitions, including "cost-to-charge ratio," "total Medicaid inpatient days," and "inflation update factor." The amendments also delete the definition of "allowable cost" and add definitions for "adjudicated" and "HHSC." Finally, HHSC proposes changing a number of definitions to specify that HHSC will use adjudicated claims data rather than billed claims data as the basis for DSH qualification and payment computations.

The amendment at subsection (d) changes the amount of funds a hospital may receive under this rule from up to 175 percent to up to 100 percent of its adjusted hospital-specific limit. The state paid state-owned teaching hospitals more than 100 percent of their adjusted hospital-specific limits in fiscal years 2004 and 2005; therefore, this amendment does not have a fiscal impact for fiscal year 2009 or beyond.

Subsection (e) sets out how HHSC determines each hospital's hospital-specific limit. The amendment to subsection (e)(1)(A) specifies that HHSC does not consider non-hospital services in the calculation of the ratio of costs to charges. The amendment to subsection (e)(1)(B) prohibits participating hospitals from including certain unreimbursable cost centers as defined by CMS and details the cut-off date for hospitals to report charges and payments for services to the uninsured. The amendment to subsection (e)(3) describes that when a hospital has a Medicaid profit in its calculation of its Medicaid shortfall, the hospital's cost of uninsured patients will be lowered by the amount of the profit.

The amendment at subsection (g) clarifies that if a hospital is located in a federal natural disaster area, while HHSC may accept older data to meet state DSH requirements, it cannot waive certain federal requirements.

The amendment at subsection (h) explains that DSH payments are subject to the availability of state and federal funds.

The amendment at subsection (i) explains that a hospital may request a review of its ineligibility for DSH or its estimated DSH payment amounts. The amendment also describes the review process, including the grounds for review and the procedure and timelines for requesting a review.

The amendment at subsection (j) outlines that, if a federal waiver is secured to implement the Medicaid reform provisions related to the Texas Health Opportunity Pool Trust Fund, HHSC will not redistribute DSH funds if a hospital voluntarily withdraws from the DSH program or does not re-apply to participate in the program, even though it would have qualified for DSH funding. The amendment also prohibits such hospitals from receiving DSH payments for the next three consecutive federal fiscal years.

The amendment at subsection (k) describes the recoupment and redistribution of DSH funds if an overpayment is made to a hospital.

The amendment at subsection (l) requires HHSC to conduct periodic on-site audits and desk reviews using statistically valid methods.

The amendment at subsection (m) explains that, if a hospital fails to maintain and provide adequate documentation to support its data, HHSC will exclude that data from DSH calculations for that hospital.

Other changes were made throughout the rule to update references, move language and re-order provisions as necessary to reflect changes.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that for the first five-year period the proposed amendment is in effect, there are no fiscal implications for state government as a result of enforcing or administering the section. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-Business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro businesses to comply with the rule because they will not be required to alter their business practices as a result of the rule. Therefore, Government Code §2006.002 does not require that HHSC complete an Economic Impact Statement or a Regulatory Flexibility Analysis. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is the standardization and clarification of the administrative rules governing DSH funding for state-owned teaching hospitals. The proposed changes to the rule also further Medicaid reform efforts.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would other wise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Henry Welles, Rate Analyst in the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax (512) 491-1983 or by e-mail at Henry.Welles@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for July 22, 2008, from 9 a.m. to 12 p.m., in the HHSC Lone Star Conference Room, at 11209 Metric Boulevard, Austin, Texas 78758. Persons requiring further information, special assistance, or accommodations should contact Henry Welles at (512) 491-1368.

Statutory Authority

The amendment is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendment affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8067. Disproportionate Share Hospital Reimbursement Methodology for State-Owned Teaching Hospitals.

(a) A state-owned teaching hospital [~~owned and operated by a state university or other agency of the state~~] is eligible for disproportionate share hospital (DSH) reimbursement. A state-owned teaching hospital is a hospital owned and operated by a state university or other agency of the state. Each year, HHSC will mail a DSH application packet to all active Medicaid hospitals. The application packet may request self-reported data HHSC deems necessary to supplement the AHA/THA/DSHS annual hospital survey and the fiscal intermediary data. A state-owned teaching hospital may apply for DSH funds annually by completing the application packet by the deadline specified by HHSC in the packet's cover letter. A hospital that fails to submit a complete application by the deadline specified by HHSC will not be eligible to receive DSH funds that year.

(b) Conditions of participation. Before the beginning of each federal fiscal year, which begins October 1, HHSC will survey Medicaid hospitals to determine which hospitals meet the state's conditions of participation.

(1) A hospital eligible for DSH reimbursement must allow HHSC or its designee to have access to its hospital records and accounting systems during regular business hours.

(2) [~~(b)~~] Each hospital participating in the DSH program must have a Medicaid inpatient utilization rate of at least one percent [~~defined at a minimum of 1.0%~~].

(3) [~~(c)~~] To qualify for disproportionate share payments, each hospital must have at least two physicians (M.D. or D.O.), with staff privileges at the hospital, who have agreed to provide non-emergency [~~nonemergency~~] obstetrical services to Medicaid clients. The two-physician requirement does not apply to hospitals whose inpatients are predominantly under 18 years old or that did not offer non-emergency [~~nonemergency~~] obstetrical services to the general population as of December 22, 1987.

(c) [~~(d)~~] For purposes of this section, the following words and terms[~~,~~] shall have the following meanings, unless the context clearly indicates otherwise.

(1) Total Medicaid inpatient days--The [~~Total Medicaid inpatient days means the~~] total number of [~~billed~~] Title XIX inpatient days based on the latest available state fiscal year adjudicated claims data for patients eligible for Title XIX benefits. The term excludes days for patients who are covered for services that are fully or partially reimbursable by Medicare. The term includes Medicaid-eligible days of care adjudicated by managed care organizations. Total Medicaid inpatient days includes days that were denied payment for reasons other than eligibility. [~~Included are inpatient days of care provided to patients eligible for Medicaid at the time the service was provided, regardless of whether the claim was paid. These denied claims include, but are~~

not limited to, claims for patients whose spell of illness limits are exhausted, or claims that were filed late.] The term excludes days attributable to Medicaid patients between the ages of 21 and 65 who live in an institution for mental diseases. The term includes days attributable to individuals eligible for Medicaid in other states. Total Medicaid inpatient days includes days with adjudicated dates between September 1 and August 31 (state fiscal year).

(2) Total inpatient census days--The [Total inpatient census days means the] total number of a hospital's inpatient census days during its fiscal year ending in the previous calendar year.

(3) Cost of services to uninsured patients--The [Cost of services to uninsured patients is the] inpatient and outpatient charges to patients who have no health insurance or other source of third party payment for services provided during the year, multiplied by the hospital's ratio of costs to charges (inpatient and outpatient), less the amount of payments made by or on behalf of those patients. Uninsured patients are those patients who have no health insurance or other source of third party payments for services provided during the year. Uninsured patients include those patients who do not possess health insurance that would apply to the service for which the individual sought treatment.

(4) Hospital specific limit--The [Hospital specific limit is the]sum of the following two measurements: Medicaid shortfall and costs of services to uninsured patients.

(5) Medicaid shortfall--The [Medicaid shortfall is the] cost of services (inpatient and outpatient) furnished to Medicaid patients, less the amount paid under the non-disproportionate share hospital payment methodology [method under this same plan].

(6) Cost-to-charge ratio (inpatient and outpatient)--Total adjudicated charges for each hospital from all payers that are converted to cost by dividing the total cost by the total gross inpatient charges. The cost-to-charge ratio is an all-payer ratio that covers all applicable hospital costs and charges relating to patient care. This ratio does not distinguish between payer types such as Medicare, Medicaid or private pay. [Cost-to-charge ratio is the hospital's overall cost-to-charge ratio, as determined from its Medicare cost report submitted for the fiscal year ending in the previous calendar year. The latest available Medicare cost report is used in the absence of the cost report for the hospital's fiscal year ending in the previous calendar year.]

(7) Adjusted hospital specific limit--A [Adjusted hospital specific limit is a] hospital specific limit trended forward to account for the inflation update factor since the base year.

(8) Inflation update factor--HHSC or its designee applies a cost of living index to a hospital's unreimbursed Medicaid costs and its cost of treating uninsured patients, based on the Centers for Medicare and Medicaid Services (CMS) Prospective Payment System Hospital Market Basket Index. [Inflation update factor is a general increase in prices as determined by the department.]

(9) Medicaid inpatient utilization rate--The [Medicaid inpatient utilization rate is the] fraction expressed as a percentage, the numerator of which is the hospital's number of inpatient days attributable to patients who (for these days) were eligible for medical assistance under a state plan, and the denominator of which is the total number of the hospital's inpatient days in that period. The term "inpatient day" includes each day in which an individual (including a newborn) is an inpatient in the hospital, whether or not the individual is in a specialized ward and whether or not the individual remains in the hospital for lack of suitable placement elsewhere.

(10) Payments received from uninsured patients--[Payments received from uninsured patients are those] Those payments received from or on behalf of uninsured patients as defined in paragraph (3) of this subsection.

(11) Charity charges--The [Charity charges are the] total amount of hospital charges for inpatient and outpatient services attributed to charity care in a cost reporting period.

[(12) Allowable cost--Allowable cost is defined by the department using the rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers when providing services in conformity with applicable state and federal laws, regulations, and quality and safety standards.]

(12) [(13)] Available fund--The [available fund for state teaching hospitals is the] total amount of funds that may be reimbursed to the state-owned teaching hospitals [as determined below].

(13) HHSC--The Texas Health and Human Services Commission or its designee.

(14) Adjudicated--A hospital claim that is approved or denied for payment by HHSC or its designee, or another payer in the case of non-HHSC programs.

(d) [(e)] HHSC [The Department] reimburses state-owned teaching hospitals on a monthly basis from the available fund for state-owned teaching hospitals. Monthly payments equal one-twelfth of annual payments unless it is necessary to adjust the amount because payments are not made for a full 12-month period, to comply with the annual state disproportionate share hospital allotment, or to comply with other state or federal disproportionate share hospital program requirements. Prior to the start of the next federal fiscal year, HHSC [the department] determines the size of the fund to reimburse state-owned teaching hospitals for the next federal fiscal year. The available fund to reimburse the state-owned teaching hospitals equals the total of their disproportionate share hospital payments, as follows: a state-owned teaching hospital that meets the requirements for disproportionate share status receives annually up to 100 [175] percent of its adjusted hospital specific limit.

(e) [(f)] HHSC [The department or its designee] determines the hospital specific limit for each disproportionate share hospital. This limit is the sum of a hospital's Medicaid shortfall, as defined in subsection (c) [(d)](5) of this section, and its cost of services to uninsured patients as defined in subsection (c) [(d)](3) of this section, multiplied by the appropriate inflation update factor, as provided for in subsection (f) [(g)] of this section.

(1) The Medicaid shortfall includes total Medicaid [billed] charges related to adjudicated claims and any Medicaid payments made for the corresponding inpatient and outpatient services delivered to Texas Medicaid clients, as determined from the hospital's fiscal year claims data, regardless of whether the claim was paid. These denied claims include, but are not limited to, patients whose spell of illness claims were exhausted, or payments were denied due to late filing. Refer to subsection (c)[(d)](5) of this section.

(A) The total [billed] Medicaid charges related to adjudicated claims for each hospital are converted to cost, utilizing a calculated cost-to-charge ratio (inpatient and outpatient). HHSC [The department or its designee] determines that ratio by using the hospital's CMS [HCFA] 2552-92, Hospital and Hospital Health Care Complex Cost Report, that was submitted for the fiscal year ending in the previous calendar year. HHSC [The department] or its designee uses the latest available Medicare cost report in the absence of the Medicare cost report submitted in the fiscal year ending in the previous calendar year. To determine the cost-to-charge ratio (inpatient and outpatient) for each hospital, HHSC [the department or its designee] uses the total cost from the CMS [HCFA] 2552-92, Worksheet B, Part 1, Column 25,

and total charges from the CMS [~~HCFA~~] 2552-92, Worksheet C, Part 1, Column 8. The ratio is the total cost divided by the total gross patient charges. The ratio of costs to charges is an all-payer ratio, which does not distinguish between payer types. HHSC removes from the calculation of the cost-to-charge ratio non-hospital services including, but not limited to, ambulance, rural health clinics, primary home care, home health agencies, hospice, and skilled nursing facilities.

(B) HHSC [~~The department or its designee~~] determines the cost of services to patients who have no health insurance or source of third party payments for services provided during the year for each hospital. Hospitals are surveyed each year to determine charges that can be attributed to patients without insurance or other third party resources. Hospitals must not include unreimbursable cost centers listed on the CMS Form 2552, Schedule B, Part I, Column 25, Lines 96 through 100. The charges are multiplied by each hospital's cost-to-charge ratio (inpatient and outpatient) to determine the cost. Hospitals that report annually charges for patients without health insurance or other source of third party payments, and payments made by or on behalf of those patients, must include charge and payment adjustments made during the hospital's fiscal year and for five months after the end of the hospital's fiscal year.

(2) After HHSC [~~the department or its designee~~] determines each disproportionate share hospital's cost of services to patients who have no health insurance or source of third party payments for services provided during the year, HHSC [~~the department~~] subtracts from each hospital's cost of services the amount of payments made by or on behalf of those patients [~~who have no health insurance or source of third party payments for services provided during the year~~].

(3) If HHSC determines that a hospital's Medicaid payments exceed its Medicaid costs in the hospital's fiscal year, HHSC will reduce the hospital's cost of uninsured patients in the year the DSH payment is made by the amount of the overage.

(f) [~~(g)~~] HHSC [~~The department or its designee~~] trends each hospital's hospital specific limit using [~~"hospital specific limit" calculated from its historical base period cost report from subsection (f) of this section to the state's fiscal year disproportionate share program. For hospitals without full 12-month fiscal year cost reports, the department or its designee annualizes the cost to calculate the hospital specific limit. The department or its designee uses~~] the inflation update factor, as defined in subsection (c) [~~(d)~~](8) of this section, in calculating the adjusted hospital specific limit. HHSC [~~The department or its designee~~] calculates the number of months from the mid-point of the hospital's year [~~cost reporting period~~] to the mid-point of the federal DSH [~~state fiscal year disproportionate share~~] program fiscal year. HHSC [~~The department or its designee~~] then multiplies the portion of the hospital's [~~cost report~~] year occurring in the DSH program [~~state~~] fiscal year by the inflation update factor defined in subsection (c)(8) of this section [~~used for each state fiscal year in the calculation of hospital reimbursement rates for each state fiscal year. The product of these calculations is multiplied by each hospital's hospital specific limit~~] to obtain each hospital's adjusted hospital specific limit.

(g) [~~(h)~~] If a hospital is located in a county that is declared a federal natural disaster area, it may request that the state use the hospital's data, excluding data used to calculate the one percent Medicaid minimum utilization rate and the adjusted hospital specific limit in compliance with sections 1923(d)(3) and 1923(g) of the Social Security Act, from the most recent year prior to the natural disaster for qualification and reimbursement purposes. This request must be submitted in writing to the state with the hospital's annual DSH application. The state reserves the right to approve or deny the written exception request and will notify the hospital of its decision prior to the beginning of the DSH program year. Hospitals may request a [~~an administrative~~] review of the state's decision in this subsection. [~~The review will be conducted under the provisions of §355.8065(g) of this title (relating to Additional Reimbursement to Disproportionate Share Hospitals).~~]

(h) All DSH payments are subject to the availability of appropriated state and federal funds.

(i) Review of HHSC determination of eligibility and estimated payment amount. HHSC notifies a hospital of its tentative eligibility or ineligibility and estimated payment amount at the beginning of the federal fiscal year. A hospital that does not qualify or that contends the amount of payment is incorrect may request a review by the state in accordance with paragraph (1) of this subsection. Tentative eligibility determinations and estimated payment amounts for all hospitals may change depending on the outcome of the review.

(1) Except as specified in paragraph (4) of this subsection, a request for review must be submitted in writing to HHSC within 15 calendar days of the date of the notification of tentative eligibility or ineligibility. The request must contain specific documentation supporting its contention that HHSC made factual or calculation errors which, if corrected, would result in the hospital's qualifying for payments or receiving a higher payment amount. A hospital must submit additional documentation within 30 calendar days of the date of notification of tentative eligibility or ineligibility. The written request for review and all supporting documentation must be sent to the Director of Hospital Reimbursement, Rate Analysis Department of HHSC.

(2) The review is:

(A) limited to allegations of factual or calculation errors made by HHSC.

(B) supported by documentation submitted by the hospital or used by HHSC in making its original determination.

(C) solely a paper review and is not an adversarial hearing.

(3) HHSC makes a determination and notifies the hospital of the results of a review at the time of the first monthly payment. Any adjustments made as a result of a review will not exceed the limits of available DSH funds.

(4) No additional review is conducted after first monthly payments are made unless, at the time of the first monthly payments, HHSC gives a hospital its first notice that the hospital is ineligible for DSH funding. In that case, the hospital may then request a review in accordance with paragraph (1) of this subsection.

(5) A request for review may not be based on a hospital's claim that the data submitted to HHSC by the hospital or a fiscal intermediary is incorrect or incomplete. On or about April 1 of each year, HHSC sends each participating hospital a report of adjudicated data received from fiscal intermediaries reflecting the hospital's Medicaid days, Medicaid charges, and Medicaid payments during the relevant time period. A hospital may communicate directly with the fiscal intermediary to correct any data in that report that the hospital believes is inaccurate. The fiscal intermediary must submit a corrected report to HHSC by July 1 of each year for the corrected report to be considered.

(6) At the request of a hospital, HHSC will conduct administrative reviews in cases where a hospital and a fiscal intermediary cannot resolve differences in adjudicated data. HHSC will make the final determination in these cases.

(j) Voluntary withdrawal from the DSH program. If HHSC successfully obtains a federal waiver under Section 1115 of the Social Security Act to implement the Medicaid reform provisions in Chapter

531 of the Texas Government Code, Subchapter N, Texas Health Opportunity Pool Trust Fund:

(1) HHSC will recoup all DSH payments made during the same federal fiscal year to a hospital that voluntarily terminates its participation in the DSH program.

(2) HHSC will not redistribute to other hospitals under this division the amount of any recovered and non-reimbursed projected DSH funds.

(3) A hospital that voluntarily terminates from the DSH program will be ineligible to receive payments under this section for the next three consecutive federal fiscal years after the hospital's termination.

(4) If a hospital receives DSH funding in one federal fiscal year and does not apply for DSH funding in the following federal fiscal year, even though it would have qualified in that year, the amount of that hospital's DSH funding in the previous year will not be redistributed to other hospitals under this section.

(5) If a hospital does not apply for DSH funding in the federal fiscal year following a federal fiscal year in which it received DSH funding, even though it would have qualified for DSH funding in that year, the hospital will be ineligible to receive payments under this section for the next three consecutive federal fiscal years after the year in which it did not apply.

(k) Recovery of DSH funds. If a hospital receives an overpayment of DSH funds, including an overpayment that results from HHSC error or audit, HHSC will recoup such overpayment. Notwithstanding subsection (j) of this section, these funds will be redistributed to DSH providers that are eligible for additional payments subject to their hospital specific limits.

(l) Audit process. HHSC will periodically audit and desk review data submitted by DSH providers. HHSC will determine the number of hospitals that will be audited on site and that will undergo desk reviews. HHSC will use statistically valid methods to determine the sample size of information for auditing or desk review.

(m) Failure to provide supporting documentation. HHSC will exclude data from calculations under this section if a hospital fails to maintain and provide adequate documentation to support that data.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803280
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 424-6586

♦ ♦ ♦

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

SUBCHAPTER C. UTILIZATION REVIEW

The Health and Human Services Commission proposes the repeal of §371.212, relating to Case Mix Classification System; the repeal of §371.213, relating to Utilization Review and Control Activities Performed by Texas Health and Human Services Commission; and the repeal of §371.214, relating to Texas Index for Level of Effort Assessments. The Health and Human Services Commission also proposes new §371.212, relating to Minimum Data Set Assessments and new §371.214, relating to Resource Utilization Group Classification System. The proposed new rules will replace the existing rules proposed for repeal to reflect Texas's conversion from the Texas Index for Level of Effort (TILE) classification system and provider payment methodology to the federal Resource Utilization Group (RUG) classification system and provider payment methodology.

BACKGROUND AND JUSTIFICATION

The Health and Human Services Commission (HHSC) Office of Inspector General (OIG) routinely reviews a nursing facility's level of care assessments of its Medicaid residents to safeguard against fraud, waste, or abuse. HHSC-OIG's Utilization Review program monitors resident assessment claims to ensure payments for Medicaid services are appropriate. The reviews identify correct and incorrect payments. HHSC recovers incorrect payments and reimburses underpayments to the nursing facility. Currently, the Texas Department of Aging and Disability Services (DADS) makes Medicaid reimbursements to nursing facilities using the TILE classification system and provider payment methodology.

In 1995, the 74th Legislature, Regular Session, passed House Bill 867, amending the Health and Safety Code, Chapter 242, requiring DADS to base Medicaid reimbursements to nursing facilities on the Centers for Medicaid and Medicare Services' Resource RUG classification system and provider payment methodology. Through the TILE to RUG Conversion Project, DADS is in the process of converting its automated systems and amending its administrative rules to comply with the legislative mandate. This proposal makes changes to the HHSC-OIG rules affected by the conversion from the TILE classification system to the RUG classification system. The proposed new rules describe the Minimum Data Set (MDS) RUG classification model and how HHSC-OIG will conduct utilization reviews under the RUG model.

Moving from the TILE classification system to the RUG classification system will increase efficiencies in the assessment process for providers and the accuracy and appropriateness of claims submitted for Medicaid reimbursement. Because nursing facilities already use the RUG classification system forms under the Medicare program, the use of these forms in the Medicaid program will eliminate redundancy and reduce time for nursing facilities. In addition, the State of Texas anticipates that nursing facilities will submit more appropriate claims to reflect a Medicaid recipient's need for services due to the use of 34 payment categories under RUG versus 11 payment categories for TILE. The proposed new rules also establish: (i) a methodology for calculating an underpayment or overpayment to a facility; and (ii) assessment claims criteria to deter a possible pattern or practice relating to administrative or assessment errors. As a result, HHSC-OIG anticipates that improper Medicaid payments will be substantially reduced.

SECTION-BY-SECTION SUMMARY

Proposed new §371.212 describes requirements nursing facilities must follow when completing the Minimum Data Set (MDS) Recipient Assessment Instrument (RAI), including time frames for completing certain assessments and documentation

that must be included in the Medicaid recipient's clinical record to support items claimed on the MDS RAI. The requirements are consistent with the Long-Term Care Facility Resident Assessment Instrument User's Manual (MDS RAI User's Manual), Version 2.0, December 2002, published by the Centers for Medicare and Medicaid Services (CMS), which describes processes and clinical items required for MDS resident assessments.

Proposed new §371.214 describes the requirements for signatures on the MDS RAI; documentation that must be included in the Medicaid recipient's clinical record to support an MDS assessment claim; training of nursing facility staff on the MDS; the procedure for making corrections to a submitted MDS assessment claim; the HHSC-OIG process for conducting an onsite utilization review; clinical record access; record affidavit requirements; and the procedures a nursing facility must follow when requesting reconsideration and appeal of utilization review findings.

In addition, the proposed new §371.214 describes HHSC-OIG's sampling methodology. A statistically valid random sample will be drawn from a population of the nursing facility's paid claims associated with RUG classifications for a specific time period. The proposed new section also addresses the onsite utilization review process; the criteria for determining an administrative error; the calculation of a facility's MDS assessment claim error rate based on the sampled RUGs in which reclassifications occurred; the calculation of an MDS assessment claim underpayment or overpayment; the recovery of any identified overpayment(s); and referrals to the HHSC-OIG Medicaid Integrity Program for investigation.

An administrative error occurs when a required signature or paper form is missing and not made available during the onsite review period. An assessment error is a RUG reclassification identified during the utilization review process that results in an underpayment(s) or overpayment(s) associated with that form. HHSC-OIG will reimburse underpayment(s) to the facility. HHSC will calculate any overpayment(s) based on the facility's error rate. To calculate any overpayment, HHSC-OIG will extrapolate to the population and the extrapolation will be applied only to the RUG classifications found in error. For the first year the rules are in effect, HHSC-OIG will extrapolate when a facility's error rate exceeds 25%. For the first six months of the second year the rules are in effect, HHSC-OIG will extrapolate when a facility's error rate exceeds 20%. For the second six months of the second year the rules are in effect, HHSC-OIG will extrapolate when a facility's error rate exceeds 15%. For the third year and subsequent years the rules are in effect, HHSC-OIG will extrapolate for any error rate identified. For all years the rules are in effect, HHSC-OIG will refer a facility to its Medicaid Program Integrity Division if the facility's error rate is greater than 25% or for a suspected program violation. The proposed sampling methodology and recovery methodologies are needed to maintain cost and compliance effectiveness, as well as strengthen HHSC-OIG's ability to identify improper payments and potential fraud, waste, and abuse. In HHSC-OIG's view, this methodology strikes a balance between two competing interests while addressing the concerns of the provider community.

The proposed repeal of §§371.212, 371.213, and 371.214 deletes existing requirements governing a nursing facility's use of the TILE case mix classification system and assessments.

FISCAL NOTE

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that for the first five years the proposed new rules and the repeal are in effect, there will be an increase in cost to the state. These costs relate to the need for additional nurse reviewers to handle the increased frequency and time required to conduct utilization reviews using the longer and more detailed RUG classification system, additional equipment and supplies to support the additional staff, modifications to the automated computer application used by the nurse reviewers, and staff training on the new assessment instrument and automated system.

Mr. Suehs has also determined that the state may avoid future costs as a result of the possible reduction in inappropriate Medicaid reimbursements and/or billing due to increased accuracy and frequency of Medicaid recipient assessments, an improved methodology for calculating an underpayment or overpayment to a facility, and new criteria to deter a possible pattern or practice relating to administrative or assessment errors associated with the RUG classification system and its requirements. Local governments will not incur additional costs and there will be no cost to local health and human service agencies. For state fiscal year (FY) 2008, the increase in cost to the state as a result of the rules is estimated at $534,847, which will be financed with general revenue ($146,212) and federal funds ($388,635). For FY 2009, this cost is estimated at $864,339 with a Method of Finance $222,335 from General Revenue and $642,004 from Federal Funds. For FY 2010-2012, the cost is estimated at $864,339 with a Method of Finance $222,335 from General Revenue and $642,004 from Federal Funds.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC-OIG has determined that there will be no effect on small businesses or micro-businesses required to comply with the new and repealed rules as proposed. There are no anticipated economic costs to persons who are required to comply with the new and repealed rules as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT AND COSTS

Judy Knobloch, Director, Quality Review, HHSC-OIG has determined that for each year of the first five years the new and repealed rules are in effect, the expected public benefit is more accurate MDS assessments resulting in more appropriate care and services provided to Medicaid nursing facility residents and, in turn, more appropriate submission of claims by nursing facilities for these services. In addition, Judy Knobloch, Director, Quality Review, HHSC-OIG has determined that there will be no economic cost to persons who are required to comply with the new and repealed rules. The new and repealed rules will not affect the local economy.

REGULATORY ANALYSIS

HHSC-OIG has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

HHSC-OIG has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Comments on this proposal must be in writing and submitted to Judy Knobloch, Health and Human Services Commission, Office of Inspector General, Utilization Review Unit, at P.O. Box 85200, Austin, Texas 78708-5200, or FAX at (512) 836-6487. Comments will be accepted no later than 30 days after the date of this issue of the *Texas Register*. If the last day to submit comments falls on a Sunday, HHSC-OIG will accept only comments that are: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to HHSC-OIG UR at 11101 Metric Boulevard, Building I, Austin, Texas, before 5:00 p.m. on the last working day of the comment period; or (3) faxed by midnight on the last day of the comment period. On faxed comments, please state in the subject line, "Comments on Proposed Rules Concerning MDS Assessments.

PUBLIC HEARING

Note: Prior to publication in the *Texas Register*, a public hearing will be scheduled to occur during the public comment period on a date to be determined.

1 TAC §§371.212 - 371.214

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Texas Government Code, §531.0055, which provides the HHSC executive commissioner the authority to adopt rules for the operation and provision of services by the health and human services agencies; the Human Resources Code, §32.021, which authorizes HHSC's executive commissioner to adopt necessary rules for the proper and efficient operation of the Medicaid program; and the Texas Government Code, §531.021(a), which provides HHSC with the authority to administer the Medicaid program in Texas; §531.102 which provides HHSC-OIG with the authority to obtain any information or technology necessary to enable it to meet its responsibilities; and §531.102(e) which provides HHSC-OIG the authority to set specific claims criteria that, when met, require the office to begin an investigation.

This proposal affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§371.212. Case Mix Classification System.

§371.213. Utilization Review and Control Activities Performed by Texas Health and Human Services Commission (Commission).

§371.214. Texas Index for Level of Effort (TILE) Assessments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803253
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 424-6900

♦ ♦ ♦

1 TAC §371.212, §371.214

The new sections are proposed under Texas Government Code, §531.0055, which provides the HHSC executive commissioner the authority to adopt rules for the operation and provision of services by the health and human services agencies; the Human Resources Code, §32.021, which authorizes HHSC's executive commissioner to adopt necessary rules for the proper and efficient operation of the Medicaid program; and the Texas Government Code, §531.021(a), which provides HHSC with the authority to administer the Medicaid program in Texas; §531.102 which provides HHSC-OIG with the authority to obtain any information or technology necessary to enable it to meet its responsibilities; and §531.102(e) which provides HHSC-OIG the authority to set specific claims criteria that, when met, require the office to begin an investigation.

This proposal affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§371.212. Minimum Data Set Assessments.

(a) Under 40 TAC §19.801 (relating to Resident Assessment), a nursing facility must conduct initially and periodically thereafter a comprehensive, accurate, standardized, reproducible assessment of each nursing facility recipient's functional capacity that describes the recipient's ability to perform daily life functions and significant impairments in functional capacity. The nursing facility must conduct the assessment using a Minimum Data Set (MDS) Resident Assessment Instrument (RAI) based on the MDS RAI Resource Utilization Group (RUG-III) 34-group case mix classification system selected by the state and established by the Centers for Medicare and Medicaid Services (CMS).

(1) Requirements for completing the MDS are derived from the RAI, including the MDS, specified by the Department of Aging and Disability Services (DADS). The nursing facility must adhere to any updates released by CMS in addition to the state specific mandates. To the extent such CMS updates conflict with DADS specific mandates, the CMS updates shall control.

(2) Completion of the MDS does not remove the nursing facility's responsibility to document in a clinical record a detailed assessment of all relevant issues that affect the recipient. All clinical record documentation must chronicle, support, and be consistent with the findings of, rather than conflict with, each MDS assessment. Documentation in the clinical record must contain pertinent facts, findings, and observations about an individual's health history including past and present illnesses, treatments, and outcomes to support the care the recipients are receiving. Inconsistent and unsupported findings will not be validated and may result in an adjustment in the RUG-III classification.

(3) All coded items on MDS assessments submitted for Medicaid reimbursement must be supported by documentation in the recipient's clinical record. Sources of information (e.g., other health care professionals, family members) utilized for the MDS assessment must be identified and must be supported by the clinical record.

(4) Nursing facility resident records must be maintained in accordance with:

(A) 40 TAC §19.1910 (relating to Clinical Records);

(B) 40 TAC §19.1912 (relating to Additional Clinical Record Service Requirements);

(C) 40 TAC §19.1210 (relating to Certification and Recertification Requirements in Medicaid-Certified Facilities);

(D) 40 TAC §19.1924 (relating to Financial Records), including supporting documents and other records necessary to fully document the services and supplies provided and delivered to the resident, the medical necessity of those services and supplies, and records or documents necessary to determine whether payment for those items or services was due and was properly made;

(E) Section 354.1004 of this title (relating to Retention of Records) which requires a facility to maintain all records necessary to fully disclose the services provided and to retain these records for a period of five years from the date of the service, or until all audit questions are resolved, whichever is longer;

(F) the Health Insurance and Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 United States Code §§1320d-1320d-8;

(G) 45 Code of Federal Regulations Parts 160 and 164 (relating to Health Insurance Reform: Security Standards); and

(H) accepted professional health information management standards and practices.

(5) Documentation must have the recipient's name, and the signatures, dates of signatures, and titles of individuals providing care for the recipient. Documents, such as grids and flow sheets that include entries by multiple staff members at different times must include complete dates with initials or signatures to clearly identify who provided the care. For purposes of this subchapter, a signature may be an original handwritten, electronic, photocopier, or facsimile transmitted signature or an electronic signature submitted in compliance with HHSC policy unless the authenticity of the signature is in doubt.

(b) An admission comprehensive assessment must be completed by day 14 and include the Basic Assessment Tracking form and MDS Sections AA, AB-AD, A-R, Sections V and W, and the Long-Term Care Medicaid Information Section. The annual assessment must be completed no later than the 366th day from the last comprehensive assessment and no later than 92 days from the previous assessment.

(1) The MDS Long-Term Care Medicaid Information Section and Section W must be completed on all MDS assessments submitted for Medicaid.

(2) An admission assessment or quarterly assessment will establish RUG-III classification. Medical necessity is evaluated each time an MDS assessment is completed, until permanent medical necessity (PMN) is established by the Texas Medicaid claims administrator (MCA), as set out in 40 TAC §19.2403 (relating to Medical Necessity Determination).

(3) A significant-change assessment must be completed as soon as needed to provide appropriate care to the resident, but in no case later than 14 calendar days after the determination was made that a significant change occurred. The nursing facility must document the significant change in condition. The documentation must include a completed comprehensive MDS assessment with Resident Assessment Protocols (RAPS). A significant change assessment resets the schedule for the next annual assessment.

(4) A quarterly assessment following an admission assessment, an annual assessment, or a significant change-in-status assessment must be completed within 92 days of the previous assessment.

(5) An MDS assessment is considered complete on the date the registered nurse (RN) assessment coordinator signs and dates the MDS assessment as complete. That date may not be prior to dates for all sections completed.

(6) The MDS assessment is considered timely if it is submitted in accordance with the federal MDS submission schedule and is received by the state MCA within 31 days after the completion date.

(7) Each MDS assessment submitted must indicate the reason for the assessment.

(8) Assessment time frames are based on the assessment reference date (ARD), which is the specific end-point for a common observation period (look back period) in the MDS assessment process.

(c) All MDS items shall be coded in accordance with 42 Code of Federal Regulations §483.20 (relating to Resident Assessment); the Centers for Medicare and Medicaid Services Long-Term Care Facility Resident Assessment Instrument User's Manual (RAI User's Manual); and state specific requirements. Coding for items described in this subsection must be based on observations over the look back period specified. If the observation did not occur during the look back period, it is not coded on the MDS.

(1) Cognitive Patterns. The look back period for items described in this paragraph is seven days.

(A) Comatose Code One is claimed only when the recipient's clinical record includes a documented neurological diagnosis of coma or persistent vegetative state. The clinical record must include physician documentation of a diagnosis of coma or persistent vegetative state.

(B) Short-Term Memory Code One is claimed when it is determined that the recipient lacks the functional capacity to recall recent events. Documentation in the clinical record must support the resident's capacity to remember short-term events.

(C) For Cognitive Skills for Daily Decision Making, code the correct response between zero and three that supports the recipient's level of ability based on the clinical record. The recipient's clinical record must include documentation describing the recipient's actual performance in making everyday decisions about tasks or activities of daily living.

(2) Communication/Hearing Patterns. For Making Self Understood, code the correct response between zero and three that supports the recipient's level of ability to make himself or herself understood. The recipient's clinical record must support the resident's level of ability to express or communicate requests, needs, opinions, urgent problems, and social conversation, whether in speech, writing, sign language, or a combination of these. The look back period is seven days.

(3) Mood and Behavior Patterns.

(A) For Indicators of Depression, Anxiety and Sad mood, code between zero and two based on documented interactions and observations of the recipient. The recipient's clinical record must support the frequency of the indicators of depression, anxiety, and/or sad mood. The look back period is 30 days.

(B) For Behavioral Symptoms, code between zero and three the frequency of behavioral symptoms manifested by the resident across all three shifts as it occurred during the look back period. The

look back period is seven days. Record the frequency of behavioral symptoms manifested by the resident across all three shifts.

(4) Physical Functioning and Structural Problems. The look back period for items described in this paragraph is seven days.

(A) For Self Performance, code between zero and four or eight for self performance by the recipient in bed mobility, transfer, eating, and toilet use during the look back period. The clinical record must capture the total picture of the recipient's actual self care performance for each activity of daily living (ADL) over the seven day period, 24 hours a day.

(B) For ADL Support Provided, code from zero and three or eight to support assistance provided by staff in bed mobility, transfer, and toilet use. The clinical record must reflect the support provided by staff, for each ADL, over a 24-hour period, during the look back period.

(5) Continence Appliances and Programs. The look back period for items described in this paragraph is 14 days.

(A) For Scheduled Toileting Plan, check if recipient is on any scheduled toileting program. The documentation must include a plan for bowel and/or bladder elimination whereby staff members at scheduled times each day either take the recipient to the toilet, give the recipient a urinal, or remind the recipient to go to the toilet. This includes bowel habit training and/or prompted voiding, but does not include changing wet garments. A "program" refers to a specific approach that is organized, planned, documented, monitored and evaluated. The recipient's toileting schedule must be in a place where it is clearly communicated, available to and easily accessible to all staff. The care plan must indicate the recipient is on a routine toileting schedule.

(B) For Bladder Retraining Program, check if recipient is on any bladder retraining program that is a retraining program to teach the recipient to consciously delay urinating or to resist the urge to urinate. The care plan must include individualized goals and approaches that is organized, planned, documented, monitored, and evaluated.

(6) Disease Diagnosis. The disease conditions described in this paragraph require a physician-documented diagnosis in the clinical record. The look back period is seven days.

(A) For Diseases, code diabetes, aphasia, cerebral palsy, hemiplegia/hemiparesis, multiple sclerosis and/or quadriplegia if there is a documented physician diagnosis in the clinical record. Include active diagnoses only; do not include conditions that have been resolved or have not affected the recipient's functioning, medical treatment, or care plan.

(B) For Infections, code pneumonia and/or septicemia, if the infection was present with a documented relationship to the recipient's current functioning, medical treatment, or care plan. A physician documented diagnosis in the clinical record is required to code this item.

(7) Health Conditions. The look back period for items described in this paragraph is seven days. As applicable, review the clinical records (including the current nursing care plan) and consult with facility staff members and resident's family if the resident is unable to respond.

(A) For Problem Conditions, code documented problems or symptoms that affect or could affect the recipient's health or functional status and to identify risk factors for illness, accident, and functional decline, as they occurred during the look back period.

(B) For Dehydrated; Output Exceeds Intake Code only if the recipient has at least two of the following indicators:

(i) Receives less than 1500ml fluids daily;

(ii) One or more clinical signs or symptoms of dehydration; or

(iii) Fluid loss exceeds daily intake.

(C) For Delusions, the recipient's clinical record must support that the recipient holds fixed, false beliefs not shared by others based on observation during the look back period.

(D) For Fever, include documentation that the recorded temperature of 2.4 degrees Fahrenheit or greater than the documented established baseline for that recipient was observed during the look back period.

(E) For Hallucinations, the recipient's clinical record must support the recipient's false sensory perceptions that occur in the absence of any real stimuli as observed and documented during the look back period.

(F) For Internal bleeding, the clinical record must support frank or occult bleeding in the clinical record based on observations during the look back period, excluding simple nosebleeds that are easily controlled.

(G) For Vomiting, the clinical record must support that regurgitation of stomach contents occurred during the look back period.

(8) Oral/Nutritional Status. For Weight Change, code zero or one for weight loss. Code one if there is documented evidence of weight loss of 5% as observed during a 30-day look back period, or 10% or more as observed during a 180-day look back period. Do not round the actual weight. If a recipient cannot be weighed, the facility must use the standard no-information code.

(9) Nutritional Approaches. The look back period for items described in this paragraph is seven days.

(A) For Parenteral/Intravenous, check if there is documentation that the recipient received parenteral and/or intravenous fluids administered for nutrition or hydration during the look back period. This item can only be coded if there is supporting documentation that reflects an identified need for additional fluid intake for nutrition and/or hydration.

(B) For Feeding Tube, check if there is documentation that supports the presence of any type of tube that can deliver food, nutritional substances, fluids, and/or medications directly into the gastrointestinal system.

(C) Parenteral or Enteral Intake. The look back period for items described in this paragraph is seven days.

(i) For Total Calories, code between zero and four for the documented proportion of total calories actually received by the recipient via parenteral or tube feeding as observed during the look back period.

(ii) Average Fluid Intake: Code between zero and five for the average documented fluid intake by intravenous or tube feeding received by the recipient each day as observed in the look back period. The actual amount of fluid the recipient received each day by this mode must be recorded.

(10) Skin Condition. The look back period for items described in this paragraph is seven days.

(A) For Ulcers, code between zero and nine, corresponding to the number of skin ulcers at each stage, due to circulatory

problems or pressure, as observed during the look back period. A description of the wound must be documented in the clinical record during the look back period.

(B) For Type of Ulcer, code between zero and four to indicate the highest staged pressure ulcer present as observed during the look back period. The staging of the pressure ulcer(s) must be coded as assessed, described and documented during the look back period.

(11) Other Skin Problems or Lesions present. The look back period for items described in this paragraph is seven days.

(A) For Burns (Second or Third Degree), check for the presence of burns, from any cause (e.g., heat, chemicals) and document in the clinical record. This category does not include first-degree burns.

(B) For Open Lesions/Sores, check if documentation supports the presence of open skin lesion(s) that are not coded elsewhere. Do not code skin tears or cuts. A description of the lesions/sores must be documented in the clinical record during the look back period.

(C) For Surgical Wounds, check if documentation supports the presence of healing and non-healing, open or closed surgical incisions, skin grafts or drainage sites, on any part of the body. This category does not include healed surgical sites, stomas, or lacerations that required suturing or butterfly closure. Peripherally inserted central venous catheters (PICC) sites, central line sites, and peripheral intravenous sites are not coded as surgical wounds. A description of the wound must be documented in the clinical record during the look back period.

(12) Skin Treatments. Check all of the following provided and documented as observed during a look back period of seven days.

(A) Pressure relieving device(s) for chair, to include pressure relieving, pressure reducing, and pressure redistributing devices utilized in the recipient's chair or wheelchair, excluding egg crate cushions;

(B) Pressure relieving device(s) for bed, to include pressure relieving, pressure reducing and pressure redistributing devices, utilized in the recipient's bed, excluding egg crate mattresses;

(C) Turning/repositioning program, to include a continuous, consistent program for changing the recipient's position and realigning the body. There must be a specific approach that is organized, planned, documented, monitored, and evaluated;

(D) Nutrition or hydration intervention to manage skin problems, to include dietary measures received by the recipient and ordered for the purpose of preventing or treating specific skin conditions;

(E) Ulcer care, to include any intervention for treating ulcers due to circulatory problems and/or pressure and/or open lesions;

(F) Surgical wound care, to include any intervention for treating or protecting any type of surgical wound;

(G) Application of dressings (with or without topical medications) other than to feet; and

(H) Applications of ointments/medications (other than to feet), to include ointments or medications used to treat a skin condition.

(13) Foot Problems and Care. Check for the presence of foot problems and care to the feet supported by documentation in the clinical record. The foot problem(s) and the care provided, including signs and symptoms of infection, description of the open lesion(s), and application of dressing, must be documented as observed during a seven-day look back period.

(14) Activity Pursuit Patterns. Check all appropriate periods when recipient was awake all or most of the time with no more than a total of a one-hour nap during any such period. The clinical record must support the period(s) of a typical day when the recipient was awake all or most of the time as observed during a seven-day look back period.

(15) Medications. For injections, code from zero to seven the number of days that the recipient received any type of medication, antigen, or vaccine, by subcutaneous, intramuscular or intradermal injection. Do not include medications ordered but not given. This category does not include intravenous (IV) fluids or IV medications. The look back period for this item is seven days.

(16) Special Treatments and Procedures.

(A) For Special Treatments, check any treatments provided during the look back period. The clinical record must have documentation of administration of any treatment(s) the recipient received during the look back period, as it occurred. Do not code services that were provided solely in conjunction with a surgical or diagnostic procedure and the immediate post-operative or post-procedure recovery period. If the treatment was administered outside the facility during the look back period, documentation of the treatment administered must be documented and included in the clinical record. The look back period is 14 days.

(B) For Therapies, code the total number of days and the total number of minutes (for at least 15 minutes a day) that therapy was administered to a resident during the look back period. Code the total number of actual minutes the particular therapy was provided. Record therapies that occurred after admission/readmission to the nursing facility, were ordered by a physician, and were performed by a qualified therapist, who meets state credentialing requirements (i.e., qualified therapists or their assistants as contemplated by RAI Chapter P.3.b) or, in some instances, under such person's direct supervision. Include only medically necessary therapies furnished after admission to the nursing facility. The time should include the actual treatment time, not the time waiting or writing reports. The therapist's initial evaluation time may not be counted, but subsequent evaluations conducted as part of the treatment process may be counted. Therapy evaluations, treatments, sessions, and minutes must be documented in the clinical record, each day, as they occur. The look back period is seven days.

(C) For Nursing Rehabilitation/Restorative Care, code between zero and seven the number of days on which the technique, procedure, or activity was practiced for a total of at least 15 minutes during each 24-hour period during the look back period. This includes nursing interventions that assist or promote the recipient's ability to attain his or her maximum functional potential, but does not include procedures or techniques carried out by or under the direction of a qualified therapist(s), as identified in the Special Treatments, Procedures, and Programs section of the MDS. The nursing rehabilitation and/or restorative care must meet all of the following additional criteria. The look back period for items described in this subparagraph is seven days.

(i) Measurable objectives and interventions must be documented in the care plan and in the clinical record as observed during the look back period.

(ii) Evidence of periodic evaluation by licensed nurse must be present in the clinical record.

(iii) Nurse assistants/aides must be trained in the techniques that promote recipient involvement in the activity.

(iv) The activities must be carried out or supervised by identified members of the nursing staff. There must be documentation, including minutes, in the clinical record for the nursing rehabilita-

tion and/or restorative care program as observed during the look back period. This does not include groups with more than four recipients per identified supervising helper or caregiver. There must be documented evidence that services provided in a group setting were provided to a group of four or less.

(D) For Physician visits, code the number of days the physician examined the recipient over a 14-day look back period (or since admission if less than 14 days ago). Documentation of the physician's evaluation must be included in the clinical record.

(E) For Physician Orders, code the numbers of days on which physician orders were changed. Include written, telephone, fax, or consultation orders for new or altered treatment. Do not include order renewals without change. If no order changes exist, code zero.

§371.214. Resource Utilization Group Classification System.

(a) The Resource Utilization Group (RUG-III) 34-group classification system has seven major classification groups. The groups represent the recipient's relative direct care resource requirements.

(b) The Activities of Daily Living (ADL) score is based on the recipient's care needs that are provided by the nursing facility staff. The ADL score is used to determine a recipient's placement in a RUG-III category and is based on the recipient's care needs provided by the nursing facility staff. The score is incorporated into acuity measurements established under the RUG-III recipient classification methodology. The clinical record must support items claimed for Medicaid reimbursement on the Minimum Data Set (MDS).

(c) The state-specific Long-Term Care Medicaid Information Section is a part of the MDS assessment Resident Assessment Instrument (RAI) in Texas and must be completed for Medicaid reimbursement. The Long-Term Care Medicaid Information Section must include the last name and license number of the registered nurse (RN) assessment coordinator.

(d) The Basic Tracking Form must include:

(1) The signature and title of each licensed nurse or health care professional completing any section of the MDS assessment for Medicaid reimbursement; and

(2) The section(s) and completion date(s) corresponding to the signature of the nurse or health care professional.

(e) Each individual signing the signature section on the Basic Tracking Form is certifying that the information entered on the MDS assessment is accurate. A facility that submits false or inaccurate information is subject to sanctions under §371.1643 of this title (relating to Use of Sanctions).

(f) If the nursing facility recipient is a hospice recipient, the nursing facility must comply with the requirements of 40 TAC §19.1926 (relating to Medicaid Hospice Services) and maintain in the recipient's clinical record, copies of the completed Texas Medicaid Hospice Program Recipient Election/Cancellation/Discharge Notice (Form 3071), and the DADS Medicaid/Medicare Hospice Program Physician Certification of Terminal Illness (Form 3074).

(1) The nursing facility must acknowledge a recipient's admission to hospice services on the Special Treatments, Procedures, and Programs section when completing an MDS full, comprehensive, or quarterly assessment.

(2) An MDS assessment indicating that a recipient has elected hospice services will not be processed until the Texas Medicaid Hospice Program Recipient Election/Cancellation/Discharge Notice (Form 3071), and the DADS Medicaid/Medicare Hospice Program Physician Certification of Terminal Illness (Form 3074) are received by the Texas Medicaid Claims Administrator (MCA).

(3) When a recipient is admitted to hospice and there has not been a significant change in condition, a significant change in status assessment does not have to be completed. The recipient's next scheduled assessment may be used.

(g) Each nurse's license number submitted on the MDS assessment, Long-Term Care Medicaid Information Section, will be validated with the Texas Board of Nursing or will be validated as applicable as a nurse compact license with the licensing state. An MDS assessment will be rejected for Medicaid reimbursement if an invalid or delinquent license number is submitted on the MDS assessment, Long-Term Care Medicaid Information Section.

(h) Nursing facility staff must complete the HHSC-approved MDS training in accordance with this paragraph.

(1) The nursing facility RN Assessment Coordinator must complete the HHSC-approved online MDS training course prior to completing an MDS assessment for Medicaid payment. All other staff completing the MDS assessment for Medicaid payment are encouraged to take the MDS Training prior to completing the MDS assessment.

(2) The nursing facility RN Assessment Coordinator must repeat the MDS online training every two years. A certificate of completion will be issued at the conclusion of the training.

(3) If the nursing facility RN Assessment Coordinator does not complete the MDS training every two years as required by HHSC, the license number of the RN Assessment Coordinator will not be accepted into the state database and the MDS assessment will be rejected by the Medicaid claims administrator.

(i) An admission assessment or quarterly assessment establishes a RUG-III group.

(1) A significant change in status assessment, which requires a comprehensive MDS with Resident Assessment Protocols (RAPs), must be completed by the end of the 14th calendar day following determination that a significant change has occurred.

(2) A significant change in status assessment resets the schedule for the next annual assessment.

(j) Permanent medical necessity is determined by the Texas Department of Aging and Disability Services (DADS) in accordance with 40 TAC §19.2403 (relating Medical Necessity Determination.

(k) When correcting errors in an MDS assessment, the nursing facility staff must use the MDS Correction Policy in Chapter 5 of the Minimum Data Set, Resident Assessment Instrument User's Manual, published by the Centers for Medicare and Medicaid Services (CMS).

(1) Documentation must be maintained in the clinical record to support the corrected MDS assessment form and be available for review by HHSC-OIG staff during MDS utilization reviews.

(2) The Correction Request Form attestation of accuracy of signatures must contain the RN assessment coordinator's and DON's signatures, and the date the correction was completed.

(3) A correction to a RUG reclassification error identified during an onsite review is considered an assessment error as described in subsection (r)(2) of this section. This does not negate the facility's responsibility to make quality of care corrections pursuant to the CMS MDS Correction Policy referenced in this section.

(l) The MDS assessment establishes the rate(s) at which the Texas Medicaid program pays a nursing facility, or hospice provider for the facility's hospice residents, to support the care the nursing fa-

cility's residents receive and any information on the MDS RAI shall be considered part of each corresponding claim for Medicaid reimbursement.

(m) Prior to entering a nursing facility for review, HHSC-OIG identifies a population of paid claims from which a sample will be drawn.

(1) The population is defined as claims associated with RUG classifications:

(A) paid to the nursing facility, or hospice provider for the facility's hospice residents, for a specified time period; and

(B) that meet certain criteria, such as dollar or claim volume, as determined by HHSC-OIG.

(2) HHSC-OIG will identify the population of paid claims, along with their related RUG classifications and MDS assessment claim forms, from which a statistically valid random sample will be drawn for review. The sample generated will be a statistically valid random sample generated at a minimum confidence level of 90% and a maximum precision of 10%. Related extrapolations will be done at the lower limit of the applicable confidence interval.

(n) Utilization reviews will be conducted in accordance with this subsection.

(1) An HHSC-OIG nurse reviewer will conduct an unannounced onsite MDS utilization review of a nursing facility at least every 15 months. The frequency of onsite reviews will be determined by the accuracy of the MDS assessment(s) and the facility's error rate.

(2) The onsite review period begins when an HHSC-OIG nurse reviewer presents an entrance letter to the facility, and ends when the HHSC-OIG nurse reviewer informs the facility that the onsite review is completed. The onsite review period is subject to the provisions in subparagraphs (A) through (D) of this paragraph. The onsite review period does not include the exit conference, which is described in paragraph (3) of this subsection.

(A) The nursing facility shall provide the HHSC-OIG nurse reviewer initial access to clinical records and resources the HHSC-OIG nurse reviewer determines are necessary to initiate the onsite review process within two hours of entrance to the nursing facility. Although the facility is not required to produce all records within two hours, documentation to be reviewed must continue to be made available to the HHSC-OIG nurse reviewer during the onsite review period. If the facility indicates that necessary records or resources are located off-site or otherwise unavailable for immediate retrieval, and the facility can substantiate this fact, HHSC-OIG will grant an extension to the two-hour initial production of records requirement.

(B) The nursing facility, upon HHSC-OIG nurse reviewer request, must provide the signed and notarized Records Affidavit described in subsection (q)(4) of this section for each MDS assessment for which copies of clinical record documentation are provided to the nurse reviewer, attesting that the facility used its best efforts to obtain all relevant records, and that the documentation provided to the HHSC-OIG nurse reviewer is as complete a compilation as was possible during the onsite review period. If the nursing facility refuses to provide the required Records Affidavit, the nursing facility must state the refusal in writing and attach the statement to the records provided to the nurse reviewer.

(C) The nursing facility must ensure an assigned staff member knowledgeable of the MDS and clinical record is available at the facility to the HHSC-OIG nurse reviewer during the entire onsite review.

(D) When the HHSC-OIG nurse reviewer identifies an item coded on the assessment that can not be substantiated or does not accurately reflect the recipient's status during the applicable look back period, the HHSC-OIG nurse reviewer will notify the assigned nursing facility staff and request supporting documentation.

(i) The nursing facility must provide the requested supporting documentation to validate the coded items to the HHSC-OIG during the onsite review period and prior to the exit conference.

(I) If the onsite review period is more than one day, the nursing facility must provide the requested information during regular business hours to the HHSC-OIG reviewer by the end of the day the documentation was requested. Provided, however, that the facility shall be allowed a minimum of six business hours in which to provide requested information.

(II) Nothing in this provision shall be construed to affect the timing of an exit conference or require the reviewer to incorporate an overnight stay near the facility. It shall be the facility's responsibility to submit the supplemental records to the reviewer's place of business. The reviewer's exit conference conclusions and error rates may change after reviewing the supplemental records. Any such changes will be communicated to the provider within one business day.

(III) If a facility cannot produce or make available the requested information, the facility must provide a written statement explaining why the information cannot be provided as requested. The submission of a written statement does not negate HHSC-OIG's authority to take enforcement action under subchapter G of this chapter.

(ii) Lack of documentation to validate the items claimed on the MDS as described in this paragraph may be the basis for an error and RUG III group reclassification.

(iii) Lack of documentation, inconsistent documentation that misrepresents the patient's actual condition at the time it is documented, or altered documentation, which does not follow generally accepted error correction guidelines such as the MDS Correction Policy in Chapter 5 of the Minimum Data Set, may be the basis for an error and adjustment in the RUG-III group. The error or adjustment will be made based on a review of the clinical record documentation provided for the look-back period of the MDS assessment.

(3) The HHSC-OIG nurse reviewer will hold an exit conference with nursing facility staff.

(A) The exit conference will be held with the nursing facility staff at the conclusion of the onsite review period. Hospice staff is encouraged to attend to discuss the review findings of the MDS assessments for hospice recipients for whom the representative provided hospice services.

(B) The HHSC-OIG nurse reviewer will provide the nursing facility representative(s) in a leadership position(s) (e.g., the administrator, DON, charge nurse) formal written notification of all MDS validation findings during the exit process.

(i) If a hospice representative is present at the exit conference, written notification will be provided only on recipients to whom they provided services.

(ii) If the hospice representative is not present during the exit conference, HHSC-OIG will provide formal written notification of all RUG-III changes within 15 calendar days of the exit conference.

(iii) If the nursing facility disagrees with the HHSC RUG-III determination or assessment of errors, the nursing facility may submit a request for reconsideration as provided in subsection (q) of this section.

(o) The HHSC-(OIG) may sanction any provider or person as defined in §371.1601 of this title (relating to Definitions), including a managed care organization or subcontractor, pursuant to Subchapter G of this chapter that:

(1) fails to grant immediate access upon reasonable request to:

(A) the HHSC-OIG;

(B) the Attorney General's Medicaid Fraud Control Unit or Civil Fraud Division;

(C) any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on the provider, person, or the services rendered by the provider or person; or

(D) any agent or consultant of any agency or division within an agency described in subparagraph (A) of this paragraph;

(2) fails to allow the HHSC-OIG or any other federal or state agency, division, agent, or consultant, as described in paragraph (1) of this subsection to conduct any duties that are necessary to the performance of their statutory functions; or

(3) fails to provide to the HHSC-OIG or any other federal or state agency, division, agent, or consultant, as described in paragraph (1) of this subsection, upon request and as requested, for the purpose of reviewing, examining, and securing custody of records, access to, disclosure of, and custody of:

(A) copies or originals of any records, documents, or other requested items, as determined necessary by the HHSC-OIG or those specified in paragraph (1) of this subsection to perform statutory functions;

(B) any records the provider or person is required to maintain;

(C) any records necessary to verify items or services furnished and delivered under Medicaid, any other health and human services program, or any state health care program to determine whether payment for those items or services is due or was properly made; or

(D) information that includes, without limitation:

(i) clinical patient records;

(ii) other records pertaining to the patient;

(iii) any other records of services provided to Medicaid or other health and human services program recipients and payments made for those services;

(iv) documents related to diagnosis, treatment, service, lab results, charting, billing records, invoices, documentation of delivery of items, equipment, or supplies, and radiographs, and all requirements of §371.1617(a)(2) of this title (relating to Program Violations);

(v) business and accounting records with backup support documentation, statistical documentation, computer records and data, patient sign-in sheets, and schedules; or

(vi) any records necessary to fulfill its duty under the Improper Payments Information Act of 2002, Public Law 107-300, 116 Stat. 2350 (November 26, 2002) requiring state agencies take action to reduce improper payments. The term "improper payment" means any payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements, including any payment to an ineligible recipient, any payment for an ineligible service, any duplicate payment, any payment for services not received, or any payment that does not account for credit for applicable discounts.

(p) A facility that uses an electronic clinical record system and electronic submissions shall comply with this subsection.

(1) A nursing facility that elects to submit electronic or digital signatures on MDS assessments is required to have a policy in effect on the date of transmission that ensures they have proper security measures to protect against the use of an electronic or digital signature by anyone other than the individual to whom the electronic or digital signature belongs. The policy must also ensure that clinical records are made available to the HHSC-OIG and others who are authorized by law.

(2) In order to receive Medicaid reimbursement, a nursing facility that utilizes a clinical record system which is entirely electronic must maintain a hard copy of all MDS assessments in the recipient's clinical record. The hard copy of an MDS assessment must include the signatures, title, and date of all individuals completing the MDS.

(q) The HHSC-OIG will conduct a reconsideration review upon receipt of a written request for reconsideration.

(1) The reconsideration request must be sent in the form of a letter. The letter must describe in detail the reason a reconsideration review is requested for each specified assessment error. A copy of each signed affidavit executed during the onsite review for which reconsideration is requested must be attached to the letter. The reconsideration request must be submitted in the order outlined in the reconsideration request requirements provided to the nursing facility staff during the exit conference, and must include all of the information required for a reconsideration request.

(2) The reconsideration request must be mailed to the HHSC-OIG Utilization Review (UR) unit at the address indicated on the exit documentation provided to facility staff at the exit conference.

(A) The reconsideration request must be postmarked on or before the 15th calendar day after the date of the exit conference, provided, however, that if the 15th calendar day falls on a Sunday or national holiday as defined in Texas Government Code Annotated §662.003(a), the request must be postmarked on the next following business day.

(B) A reconsideration request that does not meet the requirements of this paragraph will not be granted.

(3) An MDS assessment error that is not identified in the request will not be reconsidered.

(4) A nursing facility may submit additional clinical records along with a timely request for reconsideration review. Any such additional records must be accompanied by a notarized Fact and Records Affidavit that properly authenticates the documents as true and correct duplicates of business records pursuant to TEX. R. EVID. 803(6) and TEX. R. EVID, 902(10). Additionally, the Fact Affidavit must specify: why the records were not produced during the onsite review, when the records were obtained, where the records were located, who located the records, and the circumstances under which the records were obtained. If recipient medical record documentation that was not provided during the onsite review is submitted for recon-

sideration, the weight to be given any supplemental documentation shall remain within the discretion of the reviewer.

(5) If the reconsideration review establishes that the HHSC-OIG has changed an MDS RUG-III group in error, HHSC-OIG will direct the Texas Medicaid claims administrator to correct the error retroactively.

(6) If the provider disagrees with the reconsideration determination, the provider may request a formal appeal as described in chapter 357, subchapter I of this title (relating to Hearings Under the Administrative Procedure Act).

(7) The RUG-III group and the associated per diem rate specified in the reconsideration determination remain in effect during the formal appeal process.

(r) The HHSC-OIG will recover overpayments based on onsite review findings associated with an administrative or assessment error in accordance with this subsection.

(1) An administrative error occurs if a requirement in subsections (c) and (d) of this section are not met, or the Long-Term Care Medicaid Information Section or Basic Tracking Form is not made available to the HHSC-OIG during regular business hours of the onsite review period and prior to the exit conference.

(A) If the onsite review period is more than one day, the nursing facility must provide the requested information to the HHSC-OIG reviewer by the end of the day information is requested, during regular business hours.

(B) If a facility cannot produce or make available the requested information, the facility must provide a written statement explaining why the information cannot be provided as requested. The submission of a written statement does not negate HHSC-OIG's authority to take enforcement action under subchapter G of this chapter (relating to Legal Action Relating to Providers of medical Assistance).

(C) An administrative error may be reconsidered as described in subsection (q) of this section.

(2) An assessment error is a RUG reclassification resulting in an overpayment or underpayment of an MDS assessment claim(s) identified during a utilization review of a facility.

(A) During the MDS assessment utilization review of a facility, HHSC-OIG will identify each assessment error (e.g. overpayment amount or underpayment amount of an MDS assessment claim) from the population as that term is described in subsection (m) of this section.

(B) Following the onsite review of the sampled MDS assessment claim forms, an assessment error rate will be calculated as follows:
Figure: 1 TAC §371.214(r)(2)(B)

(C) The HHSC-OIG will process all RUG reclassifications identified as a result of the onsite utilization review.

(i) The HHSC-OIG will recover from the facility any overpayment(s) associated with an MDS assessment claim. The recovered amount is a debt owed by the facility to the Texas Medicaid program. The facility will be reimbursed for any underpayment(s) identified.

(ii) To calculate any overpayment, HHSC-OIG will extrapolate to the population and the extrapolation will be applied only to the RUG classifications found in error. An adjustment equal to the net value of the identified overpayment(s) and underpayment(s) will be made. Any net overpayments will constitute a debt owed by the facility/provider, as applicable, to the Texas Medicaid program. Net underpayments will be reimbursed to the facility/provider, as applicable.

(I) For Utilization Reviews conducted on September 1, 2008 through August 31, 2009, HHSC-OIG Utilization Review will extrapolate to the population only when the error rate exceeds 25%.

(II) For Utilization Reviews conducted on September 1, 2009 through February 28, 2010, HHSC-OIG Utilization Review will extrapolate to the population only when the error rate exceeds 20%.

(III) For Utilization Reviews conducted on March 1, 2010 through August 31, 2010, HHSC-OIG Utilization Review will extrapolate to the population only when the error rate exceeds 15%.

(IV) For Utilization Reviews conducted on or after September 1, 2010, HHSC-OIG Utilization Review will extrapolate to the population in all cases of overpayment as set forth in clause (ii) of this subparagraph and the extrapolation will be applied only to the RUG classifications found in error.

(iii) An error rate greater than 25% or suspected program violation described in §371.1617 of this chapter (relating to Program Violations), will result in a referral for investigation to the HHSC-OIG Medicaid Program Integrity (MPI) Division. This referral will be made part of the state's method for identification, investigation and referral for fraud under chapter 357, subchapter M, of this title (relating to Fraud or Abuse Involving Medical Providers) and chapter 371, subchapter G of this title (relating to Legal Action Relating to Providers of Medical Assistance).

(D) An assessment error is subject to reconsideration in accordance with subsection (q) of this section.

(i) If the facility timely requests reconsideration of the onsite review results, the assessment error rate will be based on the results of the reconsideration.

(ii) If the facility does not timely request reconsideration of the onsite review, the assessment error rate will be based on the results of the onsite review.

(s) Suspected fraudulent documentation, such as medical or clinical records that appear to have been altered, falsified, or fabricated, will result in a referral for investigation to the HHSC-OIG Medicaid Program Integrity (MPI) Division. This referral will be made part of the state's method for identification, investigation and referral for fraud under chapter 357, subchapter M, of this title (relating to Fraud or Abuse Involving Medical Providers).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803276
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 424-6900

♦ ♦ ♦

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 7. PESTICIDES

SUBCHAPTER H. STRUCTURAL PEST CONTROL SERVICE

DIVISION 1. GENERAL PROVISIONS

The Texas Department of Agriculture (the department) proposes the repeal of §§7.101 - 7.113, and §7.115, amendments to Chapter 7, Subchapter H, Division 1, §7.114, and new §7.112 and §7.113, all concerning regulation of structural pest control. The amendments, repeals and new section are proposed to eliminate unnecessary sections and to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill (HB) 2458, 80th Legislative Session, 2007, which transferred the responsibilities for the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Section 7.114 is amended to add definitions for "Commissioner", "Committee", "Department", "Service" and "Suspend". Existing definitions were amended for clarification and to make those consistent with the transfer of the regulation of structural pest control to the department. The definition for "Board" is deleted. New §7.112 is to provide the department's policy and procedures for settlements of contested cases. New §7.113, Settlement of Consumer Complaints, sets forth the department's policy in encouraging the resolution of consumer complaints against structural pest control businesses through informal settlements. Sections 7.101 - 7.113 and 7.115 are no longer needed due to the transfer of structural pest control regulation to the department and the abolishment of the Structural Pest Control Board. In addition, §§7.110 - 7.113 and 7.115 are no longer needed because the subjects of these sections are covered by other department rule or policy.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposed amendments, new section and repeals are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections, as amended or repealed.

Mr. Bush also has determined that for each year of the first five years the proposed amendments, new section and repeals are in effect, the public benefit anticipated as a result of enforcing the sections will be the deletion of unnecessary rules, updating of existing definitions, providing of public information on how the department will approach settling contested cases and consumer complaints, and the establishment of a standard process for the settling of contested cases and consumer complaints. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the amended and new sections as proposed or with the proposed repeals. Therefore, no regulatory flexibility analysis is required.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register*.

4 TAC §§7.101 - 7.113, 7.115

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of §§7.101 - 7.113 and §7.115 is proposed under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

Occupations Code, Chapter 1951, is affected by the proposal.

§7.101. Purpose of the Board.

§7.102. Rule Making.

§7.103. Suspension of Rules.

§7.104. Board Office.

§7.105. Board Meetings.

§7.106. Board Seal.

§7.107. Board Records.

§7.108. Board Acceptance of Documents.

§7.109. Board Administrative Hearings.

§7.110. Administrative Penalties.

§7.111. Determination of Administrative Penalties.

§7.112. Settlements.

§7.113. Public Comment.

§7.115. Historically Underutilized Businesses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803254
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

4 TAC §§7.112 - 7.114

The amendments to §7.114 and new §7.112 and §7.113 are proposed under Occupations Code, §1951.504, which provides that

the department by rule shall establish guidelines for the settlement of a contested cases, and shall establish guidelines for the informal settlement of consumer complaints.

Occupations Code, Chapter 1951, is affected by the proposal.

§7.112. Settlement of Contested Cases.

(a) It is department policy to resolve contested cases without litigation.

(b) A "contested case settlement" is an agreement between the department and the respondent in a contested case which provides for a resolution different from the administrative penalty or license sanction, or both, originally proposed in the department's notice of violation.

(c) Contested case settlement negotiations may be in person, by phone, or through written communication, at the department's discretion, as necessary to resolve issues related to a particular contested case.

(d) Contested case settlement may incorporate any combination of authorized sanctions, additional training, or remedial actions as an alternative to the originally proposed penalty or sanction or combination of penalty and sanction.

(e) All contested case settlements are subject to approval by the commissioner. The commissioner shall state in writing the reasons for rejecting a proposed settlement.

(f) A contested case settlement is final and binding upon a respondent at the time the respondent or respondent's authorized agent signs the settlement agreement, and upon the department when approved by the commissioner through a signed order.

(g) If a contested case settlement is rejected by the commissioner, the contested case will be resolved through additional settlement negotiations consistent with the reasons for the commissioner's rejection, by stipulation to the department's originally proposed penalty or sanction or combination of penalty and sanction, or through a contested case hearing.

§7.113. Settlement of Consumer Complaints.

(a) It is department policy to encourage consumers and structural pest control businesses to resolve consumer complaints without litigation through informal settlements.

(b) As provided by Occupations Code §1951.504, the commissioner authorizes the department to engage in informal settlement negotiations with structural pest control businesses on behalf of structural pest control consumers.

(c) A consumer complaint settlement may require refund of money to the consumer in an amount no greater than the amount provided under the original contract for services or the proper and adequate performance of services that the business agreed to perform in the original contract, including any necessary retreatments of a kind no different than as agreed in the original contract, or both.

(d) The consumer or consumers filing the complaint shall be consulted regarding any proposed consumer complaint settlement prior to final approval of the agreement.

(e) All consumer complaint settlements shall be approved and signed by the Deputy General Counsel for Enforcement. The Deputy General Counsel for Enforcement shall state in writing the reasons for rejecting a proposed settlement.

(f) A settlement is final and binding upon a respondent at the time the respondent or respondent's authorized agent signs the consumer complaint settlement agreement.

(g) If a settlement is rejected by the Deputy General Counsel for Enforcement, the complaint may be resolved through additional settlement negotiations consistent with the reasons for rejection or left for the consumer and structural pest control business to resolve through private negotiation or litigation.

(h) Resolution of a consumer complaint through a consumer complaint settlement may relieve the structural pest control business from license sanction or administrative penalty liability, in any related contested case, for those violations of the structural pest control laws that promote economic consumer protection. Entering into a consumer complaint settlement agreement, however, does not relieve the structural pest control business or any of its agents from liability for violations involving the misapplication of a pesticide or for violations uncovered during the complaint investigation that are not directly related to the economic consumer protection aspects of the underlying consumer complaint.

(i) Failure to comply with an agreed consumer complaint settlement is a violation of the structural pest control laws which may subject the structural pest control business or any of its agents to additional penalties or sanctions or a combination of penalties and sanctions. It is an affirmative defense to a violation under this subsection that an affected consumer refused to accept a refund or service required under a consumer complaint settlement agreement or failed to agree to a reasonable time for performing any service, including retreatment, required under a consumer complaint settlement agreement.

(j) Nothing in this section shall be construed as resolving any civil legal dispute between a consumer and a structural pest control business and nothing herein shall be construed as relieving the consumer or the structural pest control business from any civil remedies or liabilities in connection with the consumer's complaint or any other matter.

§7.114. Definition of Terms.

In addition to the definitions set out in the Structural Pest Control Act the following words, names, and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Apprentice--A sales or service employee who has been registered with the department [~~Structural Pest Control Board~~], but has not yet passed a technician examination. [~~An apprentice card is valid for a maximum of twelve (12) months.~~]

(3) - (4) (No change.)

[~~(5) Board--The Structural Pest Control Board~~]

(5) [~~(6)~~] Category--The type of service or services a person or business entity is authorized to perform.

(6) [~~(7)~~] Chairman--An individual elected by members of the committee [~~appointed by the Governor~~], who presides over [~~at~~] the Structural Pest Control Advisory Committee [~~Board~~] meetings.

(7) Commissioner--The Commissioner of the Texas Department of Agriculture, or his designee.

(8) Committee--The Structural Pest Control Advisory Committee. A nine member committee appointed by the commissioner, whose responsibility is to gather information and advise the commissioner and staff on the business of structural pest control.

(9) [~~(8)~~] Contract--A binding agreement between two or more persons or parties that spell out in writing, the terms and conditions or such agreement, and will include, but not limited to, warranties or guarantees for structural pest control work.

(10) Department--the Texas Department of Agriculture.

(11) Director--The person employed by the department who serves as administrator of the Structural Pest Control Service.

(12) [~~(9)~~] Document--any original or official application for technician exam, application for technician license, application for exam and certified applicator license, contract, electronic forms, drawing, guarantee, invoice, map, notice of pre- construction treatment, report, service agreement, termination notice, termite pre-treatment disclosure document, training records, Wood Destroying Insect report, warranty, contract, purchase invoice, or other business paperwork required by the department. [~~Board. Relevant sections of the document must be filled out in its entirety when provided or presented by a licensee to either the customer or the Board. Documents required to be maintained by a licensee must be made available to the Board upon request.~~]

[~~(10) Executive Director--The person employed by the Board who administers the provisions of this of this Act and the rules and regulations promulgated by the Board~~]

(13) [~~(11)~~] Inactive license--license that maintains [~~reflects~~] certification, but which prohibits the technician or certified applicator from doing any pest control services for compensation.

(14) [~~(12)~~] Infest--the presence of one or more obnoxious or unwanted animal(s) or plant(s) in, on or around a structure, trees, shrubs, or other plantings adjacent to or in a residence, business establishment, industrial plant, institutional building, or street.

(15) [~~(13)~~] Inspector [~~Investigator~~]--A structural pest control inspector [~~investigator~~] employed by the department [~~Board~~].

(16) [~~(14)~~] License--A document issued by the department [~~Board~~] to a person authorizing the practicing and/or supervising of the professional service or services indicated thereon.

(17) [~~(15)~~] Licensee--The holder of a valid license.

(18) [~~(16)~~] Obnoxious and unwanted animals or plant--animals or weeds as defined in §1951.003 of the Occupations Code [~~plants~~] that limit the use or enjoyment or cause harm or damage of any type to people, pets, structures, landscapes, or the environment. Animals excluded from this definition are members of the Order Primates, hoofed mammals, members of the Family Ursidea, members of the Genus Felis, members of the Genus Canis, domestic livestock, ratites, gallinaceous birds, and alligators.

(19) [~~(17)~~] Personal Contact--Physical presence at a work location.

(20) [~~(18)~~] Revoke--To cancel a license issued under authority of the Structural Pest Control Act. When a business license is revoked, the holder of said license must acquire a new license by completing a new application, and paying the required fee. In the case of the certified applicator, the holder of such certified applicator's license must acquire a new license by completing a new application, paying a required fee, and being re-examined in each category desired by said person.

(21) Service--The Structural Pest Control Service.

(22) [~~(19)~~] Suspend--To cease operations for a period of time as specified by the department [~~Board~~].

(23) [~~(20)~~] Unit--One hour of time.

(24) [~~(21)~~] Vice-Chairman--An individual Advisory Committee [~~appointed Board~~] member elected by the committee [~~Board~~] who presides at the committee [~~Board~~] meeting in the absence of the Chairman.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803255
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

DIVISION 2. LICENSES

The Texas Department of Agriculture (the department) proposes amendments to Chapter 7, Subchapter H, Division 2, §§7.121 - 7.123, 7.125 - 7.129 and 7.133 - 7.135, and the repeal of §§7.130, 7.132 and 7.136, all concerning regulation of structural pest control. The amendments and repeals are proposed to eliminate unnecessary sections and to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill (HB) 2458, 80th Legislative Session, 2007, which transferred the responsibilities for the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Changes are made throughout the sections for purposes of clarification and to make the sections consistent with the transfer of the regulation of structural pest control to the department. Section 7.121 is amended to provide the department requirements for licenses to conduct structural pest control. This section has also been amended to eliminate the requirement that certified applicators obtain a license for each branch location. Section 7.122 is amended to change the term "board" to "department" and to clarify that both licensees and registrants are covered by this section. Section 7.123 is amended to require that the department be notified within 10 days instead of the current 30 days if the insurance coverage drops below the required coverage. Section 7.125 is amended to conform to new statutory requirements of HB 2458: to specify that an applicant must submit, not later than 30 days prior to the scheduled examination date, an application for the examination and pay the required fee; to specify that passing the appropriate category exam is a requirement of obtaining a license in addition to experience criteria; to provide exam standards and requirements allowing the department to schedule more frequent examination sessions and clarify what actions the department will take when an applicant for examination is discovered receiving or giving additional assistance during the examination; and to establish the framework for the development of an examination policy. Section 7.126 is amended to clarify that each certified commercial and noncommercial applicator and technician may not be renewed if the licensee has not met the continuing education unit requirement in the prior calendar year. Subsection (c) is deleted, as a licensee's failure to maintain adequate insurance will be addressed in the department's administrative penalty matrix. Section 7.127 is amended to make this section consistent with changes made to Occupations Code, Chapter 1951 by HB 2458. The amendments provide that a late renewal fee will be charged equal to 1-1/2 times of the renewal fee for renewal applications received

between 1 and 30 days of the expiration date, and that a late renewal fee will be charged equal to two times the renewal fee for renewal applications received between 31 and 60 days of the expiration date. Language is also added to specify that licenses that have been expired 61 days or longer are not eligible for renewal. Section 7.128 is amended to clarify the actions that may be taken upon the loss of a responsible certified applicator or business license holder. Section 7.129 is amended to add new language providing that any person submitting a request to take an examination or to receive a license may be delayed or may not receive a license if the applicant has been arrested or charged with a crime that if convicted may disqualify the person from receiving a license. Section 7.133 is amended to clarify the requirements for apprentices and technicians to include strengthening the requirement of the oversight of the responsible certified applicator in training of apprentices and technicians and to require that verifiable training records be maintained for 5 years instead of the current two years to accommodate the change in the inspection frequency for businesses from a two year cycle to a four year cycle. Section 7.134 is amended to specify that the business licensee and responsible certified commercial applicator is responsible for the proper certification and training of employees. Section 7.135 is amended to modify the criteria for the approval of self-study or electronic courses for continuing education, and remove from this section the penalty designations for sponsors and speakers that will be addressed in the department's administrative penalty matrix. Sections 7.130, relating to licensing of persons with delinquent student loans, and 7.132, relating to right-of-way certification are repealed because they are unnecessary. Requirements addressing delinquent student loans are addressed in the Education Code, and right-of-way certification requirements are addressed in the Agriculture Code. Section 7.136 is repealed because provisional licenses for Louisiana and Mississippi Certified Pest Control Applicators affected by Hurricane Katrina are no longer needed and dates that pertain to this emergency provision have expired.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposed amendments and repeals are in effect, there will be fiscal implications for state government as a result of enforcing or administering the sections, as amended. There will be an estimated increase in state revenue of $6,415 per year due to the increase in late fees provided for in the amendments to §7.127. This is based on the number of late fees processed in fiscal year 2007 and the average increase in the license renewal fee for three categories of licensure. There will be a decrease in state revenue due to the elimination of the requirement that certified applicators obtain a license for each branch location, as proposed in §7.121. It is not possible to determine an estimate of the decrease in state revenue at this time. There will be no fiscal implications for local government.

Mr. Bush also has determined that, for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amended sections and repeals will be the deletion of unnecesary rules, the updating of current rules to make them consistent with current law and practice, tightening of the timeline for notice to be provided of a licensee's insurance coverage dropping below the required coverage, clarification of the responsibilities of the responsible certified applicator in regard to oversight and training of technicians and apprentices under their watch, establishment of standard examination procedures for persons testing to obtain structural pest control licenses, and making the licensing of certified applicators less burdensome by eliminating the need to obtain a separate license for each branch location. There will be an effect on microbusinesses and small businesses licensees and licensed individuals who are required to comply with the amendments to §7.127, relating to the payment of late fees, as proposed. The amount of late fee will depend on the type of license held and the lateness of the renewal. For licensed technicians, who pay a license renewal fee of $60, the late license renewal fee will be $90, a decrease of $7.50 if up to 30 days late, and $120, a decrease of $15 if 31-60 days late. For licensed certified applicators, who pay a license renewal fee of $80, the late license renewal fee will be $120, an increase of $2.50 if up to 30 days late, and $160, an increase of $5 if 31-60 days late. For entities licensed in the business category, who pay a license renewal fee of $180, the late license renewal fee will be $270, an increase of $52.50 if up to 30 days late and $360, an increase of $105, if 31-60 days late. No regulatory flexibility analysis is required because the amendments made to increase the amount of late renewal fees paid are made to comply with a new statutory requirement, and the department has no flexibility in setting these fee rates.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register*.

4 TAC §§7.121 - 7.123, 7.125 - 7.129, 7.133 - 7.135

The amendments to §§7.121 - 7.123, 7.125 - 7.129 and 7.133 - 7.135 are proposed under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; §1951.310, which establishes fees for late renewal of structural pest control licenses and provides that a person must be reexamined by the department to obtain a license if the person applies for a renewal license after the 60th day after the date the person's license expires; §1951.312, which provides that the department by rule may adopt insurance requirements for structural pest control licensees; §1951.315, which provides the department to establish by rule continuing education requirements for licensees; §1951.406, which provides that the department shall develop a written policy governing licensing examinations for persons licensed under Chapter 1951, including procedures for administering the examinations; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

Occupations Code, Chapter 1951, is affected by the proposal.

§7.121. Persons Required to Secure License.

(a) Business License--Any person engaged in structural pest control <u>for compensation</u> must secure a business license from the <u>department</u> [~~Board~~] for each business location, including branch offices, in accordance with the Texas Structural Pest Control Act and the regulations of the <u>department</u> [~~Board~~]. Each business license holder must designate a responsible certified commercial applicator for each business location who is not also serving as a responsible certified commercial applicator for any other business licensee or any other business

location. No person shall engage in, offer to engage in, advertise for, solicit, or perform any of the services identified in §1951.003 [~~Section 1951.002~~] of the Texas Structural Pest Control Act, for compensation, without first obtaining a business license and having a certified commercial applicator certified in each license category in which business is conducted. The business license may reflect only those categories in which at least one certified applicator is actively licensed.

(b) Responsible Certified Commercial Applicator--A [~~The person licensed as a~~] certified commercial applicator[~~,~~] who has been designated by the business license holder to be [~~the responsible certified commercial applicator for a business license location, shall be~~] responsible for [~~to provide~~] training and [~~direct~~] supervision of all pest control operations of the business [~~for pest inspections, identifications, and control measures of a licensed business~~]. The person may be employed by other business [~~license~~] location(s) [~~and licensed by each location~~] as a certified commercial applicator, but may [~~must~~] only be the responsible certified commercial applicator for one business license location.

(c) Certified Commercial Applicator--A [~~The~~] person licensed in category as a certified commercial applicator who can perform pest control services, identifications and control measures without direct supervision but under supervision of the responsible certified commercial applicator. A certified commercial applicator must hold a separate license [~~be licensed~~] for every business [~~location~~] for which the certified commercial applicator is employed but is not required to hold a separate license for branch offices of an employer.

(d) Certified Noncommercial Applicator--[~~The person, who as an~~] An employee[~~,~~] of [~~is responsible for providing pest control services to~~] a governmental entity, apartment building, day-care center, hospital, nursing home, hotel, motel, lodge, warehouse, food-processing establishment, school or educational institution and other noncommercial entity [~~entities~~]. The person licensed in category as a noncommercial certified applicator who can perform pest control services, identifications and control measures without direct supervision [~~shall be responsible to ensure training and supervision for pest inspections, identifications, and control measures of a noncommercial entity~~]. A certified noncommercial applicator must be licensed for every business entity for which the certified noncommercial applicator is employed but is not required to hold a separate license for branch offices of an employer.

(e) Technician--A [~~The~~] person licensed in category who performs pest control services under the direct supervision of a commercial or noncommercial certified applicator [~~must obtain a technician license by meeting the standards prescribed by the Board in §593.21 of this title (relating to Technician License Standards)~~]. A technician must be licensed for every business or noncommercial entity for which the technician is employed but is not required to hold a separate license for branch offices of an employer.

(f) Apprentice--A [~~The~~] person, who is registered by a business or noncommercial entity to train [~~has made their initial application~~] for a technician license, has not passed the technician examination and who performs pest control services under the direct supervision of a licensed technician or a certified applicator. An apprentice may work only for the business or noncommercial entity for which they are registered.

§7.122. License Application.

(a) The application for a business license, a certified applicator license, and technician license and registration for apprentice must be submitted on forms [~~a form~~] provided by the department [~~Board~~].

(b) An application for license or registration must contain a physical address where the licensee or registrant may be located. The address of an answering service or post office box will not meet the requirements of this section.

(c) An individual may be refused [~~will not be issued~~] a license or registration from the department [~~Texas Structural Pest Control Board~~] if the individual possessed a license permitting the application of general or restricted use pesticides issued by another state agency, Indian Tribe, or federal agency in the preceding twelve month period and [~~that if~~] the individual's license has been revoked, suspended, probated or refused or had [~~has~~] been subject to enforcement action for any reason that could [~~would~~] result in the department [~~Texas Structural Pest Control Board~~] denying licensure or registration.

§7.123. Insurance Requirement.

(a) Each business license applicant and certified noncommercial applicator license applicant must submit a certificate of insurance with proof of coverage on the form provided by the department [~~Board~~] in the amount of not less than $200,000 for bodily injury and property damage coverage with a minimum total annual aggregate of $300,000 for all occurrences. The insurance policy must insure applicant for damage to persons or property occurring as a result of operations performed in the course of the business of structural pest control to premises or any other property under applicant's care, custody, or control. No new business license or certified noncommercial applicator license will be issued until insurance requirements are met. Policies must contain a cancellation provision for notification to the department [~~Board~~] not less than thirty (30) days prior to cancellation. Certified noncommercial applicators employed by governmental entities are exempt from this provision. Inactive certified applicators and technicians that do not perform structural pest control work for compensation or as a part of the duties of their employment are exempt from this provision.

(b) A licensee who operates as a wood treater who treats wood on commercial property owned by the licensee must submit with their application a general liability insurance policy or certificate of coverage in the amount of not less than $200,000 for bodily injury and property damage coverage with a minimum total annual aggregate of $300,000 for all occurrences. No license will be issued until this insurance requirement is met. Policies must contain a cancellation provision for notification to the department [~~Board~~] not less than thirty (30) days prior to cancellation.

(c) If payment of claims results in reducing the total aggregate of coverage below $300,000, the insurance carrier must notify the department [~~Board~~] and the licensee within ten (10) business [~~thirty (30)~~] days. The licensee must obtain additional coverage to meet the minimum requirements.

(d) The department [~~Board~~] will consider as sufficient only those policies issued by insurers authorized by or registered with the Texas Department of Insurance.

§7.125. Examinations.

(a) To take an appropriate examination administered by the department, an applicant must submit to the department not later than thirty (30) days prior to the scheduled examination session the appropriate form specifying the examination category desired and pay the fee for each exam requested. An individual who has previously qualified by written examination in a category shall receive a certified applicators license for the qualified category without reexamination upon renewal of a certified applicator license and meeting all requirements of these [~~the~~] regulations. Each individual not previously qualified by written examination in the category or categories for which the license is requested must secure a certified applicator license by passing an appropriate examination administered by the department [~~Board~~].

(b) In addition to passing the appropriate category [~~To qualify to take the Board~~] examination, and in order to be eligible to obtain [~~for obtaining~~] a certified commercial applicator license, the applicant must meet one of the following requirements:

(1) - (2) (No change.)

(3) Complete a department approved minimum six (6) hour certified noncommercial technician training course; [~~Have a degree or certificate in an area of the biological sciences, related to pest control, from an accredited two (2) or four (4) year college or university;~~]

(4) (No change.)

(5) Qualifies under the hardship clause outlined in §7.128 [~~§593.8~~] of this title (relating to Loss of Responsible Certified Applicator or Business License Holder).

(6) Each applicant testing for a certified applicator license must pass the general standards examination administered by the department [~~Board~~] to be eligible to be licensed in any of the categories in subsection (d)(12) of this section, Categories of Examinations.

(c) In addition to passing the appropriate category examination, and in order to be eligible to obtain [~~qualify to take the Board examination for obtaining~~] a certified noncommercial applicators license, the applicant must meet one of the following requirements:

(1) - (4) (No change.)

(d) Examination standards and requirements. [~~The examination procedure will be as follows:~~]

(1) Examinations will be given at [~~the discretion of the Board at~~] least once each quarter based on the calendar year. The department may schedule more frequent examinations as resources permit.

(2) A fee shall be charged for each examination administered by the department [~~Board~~].

(3) All examination fees are to be paid by the method determined by the department [~~Board~~] and payment must [~~should~~] be submitted with the completed application.

(4) (No change.)

(5) All examinations shall be maintained and administered by the department [~~Board or at a Board approved site~~].

(6) The applicant must take an examination, which may [~~must~~] be in written or electronic form and in general, cover the subject of the categories designated on the application.

(7) (No change.)

(8) Examinations [~~The applicant for the certified applicator examination must be able to read and write~~] shall only be administered in [~~the~~] English [~~language~~].

(9) Examinations are closed book.[~~An applicant who gives or receives unauthorized assistance during an examination shall be dismissed from the examination and results of that applicant's examination shall be voided. The applicant will not be allowed to take an examination again for the next twelve (12) months.~~]

(10) Cheating is prohibited. Cheating consists of giving or receiving unauthorized assistance in answering examination questions, bringing unauthorized materials into the exam room or using unauthorized materials to answer examination questions, copying answers or using answers from another examinee, copying questions or answers to examination questions to take from the examination room, removing an examination booklet, answer sheet, or scratch paper from the examination room, or any other action which undermines the integrity of the examination process or that has the intent or effect of providing answers to examination questions that do not reflect each examinee's own work or knowledge.

(11) "Unauthorized assistance" means the use of any written or electronic information or communication during the examination, unless expressly permitted by written instruction or rule, or the receipt or provision of any verbal or written communication, that has the intent or effect of providing answers to examination questions that do not reflect the examinee's own work or knowledge.

(12) No written materials, scratch paper, or electronic devices may be brought into the examination room or used during the examination.

(13) Scratch paper will be provided by the department as necessary and must be returned to the examination proctor at the end of each examination.

(14) The hands, arms, other body parts, or clothing or other possessions of the examinee may not contain any notes, formulas, or other markings, except for permanent tattoos which do not reproduce any information necessary for answering examination questions.

(15) If an examinee is caught cheating, the examination proctor will confiscate or require the removal of any prohibited materials or information and will mark all answer sheets of the examinee to identify the examination as potentially tainted. The examinee will be asked to leave the examination room and will not be allowed to continue with the examination.

(16) The examination proctor will file a report with the Structural Pest Control Service, along with all potentially tainted examination answer sheets, and a final determination will be made regarding the alleged cheating. The Service's determination will be communicated to the examinee in writing. If the Service determines that cheating occurred, the examinee will have 30 days to file a written appeal on the decision. If the appeal is denied, the examinee will not be allowed to take an examination again during the 12-month period immediately following the date of the exam in question and all examination fees will be forfeited. If the appeal is upheld or if the Service determines that no cheating occurred, the examinee will be allowed to retake any tests scheduled for the date of the alleged cheating at no additional cost.

(17) Upon a final determination that an examinee has cheated, any existing license of any type currently held by the licensee is subject to suspension or revocation.

(18) [~~(10)~~] Applicants who do not take a scheduled examination may not receive a refund of their examination fee unless they notify the department [~~Board~~] in writing at least ten (10) business days in advance of the examination date. Exceptions may be granted if there is an emergency such as a death or serious illness in the family.

(19) [~~(11)~~] Persons who make a passing grade and qualify for a certified applicator license must obtain a license within (12) twelve months of the grade notification date or be retested.

(20) [~~(12)~~] Examinations will be administered, maintained, and evaluated on a routine basis as determined by department examination policy in the following categories [~~will be offered by the Board~~].

(A) Pest Control--This category includes persons engaged in the inspection or control of pests in and around structures or pest animals which may invade homes, restaurants, stores, and other buildings, attacking their contents or furnishings or being a general nuisance, but do not normally attack the building itself. Examples of such pests are cockroaches, silverfish, ants, fleas, ticks, flies, mosquitoes, rats, mice, skunks, raccoons, opossums, etc.

(B) Termite and Wood Destroying Insect Control--This category includes persons engaged in the inspection or control of termites, beetles, or other wood destroying insects and wood preservation by means other than fumigation in buildings, including homes, warehouses, stores, docks, or any other structures. This category includes the treatment of termites in trees in and around structures.

(C) Lawn and ornamental--This category includes persons engaged in the inspection or control of pests or diseases of trees, shrubs, or other plantings in a park or in and around structures, business establishments, industrial parks, institutional buildings or streets.

(D) Weed Control--This category includes persons engaged in the inspection or control of weeds around homes and industrial environs.

(E) Structural Fumigation--This category includes persons engaged in pest inspection or control through fumigation of structures not primarily intended to contain food, feed or grains.

(F) Commodity Fumigation--This category includes persons engaged in pest inspection or control through fumigation of commodities or structures normally used to contain commodities. This category does not include raw agricultural commodities.

(G) Wood Preservation--This category includes persons engaged in that phase of pest control that involves the addition of preservatives to wood products to extend the life of the wood products by protecting them from damage caused by insects, fungi, and marine borers. Examples of wood products may include, crossties, poles, and posts. This includes the retreatment of power-line poles with wood preservative pesticide including fumigants.

(21) [~~(13)~~] Each applicant testing for a certified applicator license must pass the general standards examination administered by the department [~~Board~~] to be eligible to be licensed in any of the categories in this section.

§7.126. License Expiration and Renewal.

(a) Each license(s) shall [~~may~~] expire [~~in~~] twelve (12) months from the date issued or immediately upon the date that the business liability insurance expires, whichever comes first. The insurance expiration date will be determined by the date on the certificate provided to the department [~~Board~~] by the business licensee, and any policy amendments or cancellation notices issued after the effective date.

(b) Businesses and certified noncommercial applicators that change insurance coverage during a licensed period may have the license expiration extended to the new policy date, if there has not been a lapse in coverage, by paying additional [~~license~~] fees for each license to the new expiration date. [~~Certified applicators and technicians who change employers may also pay additional license fees to the new expiration date of the business or other entity under which they are operating. Refer to §593.7 (Fees) for additional license fees.~~]

[~~(c) Businesses and certified noncommercial applicators that allow insurance coverage to lapse or who fail to provide continuous proof of coverage to the Board as a result of insurance changes will no longer have a valid license(s). Reinstatement of licenses will be made upon payment of a new business license fee and any other additional fees that may be required without receiving credit for any license period between the date of the lapse in coverage and the original license expiration date.~~]

(c) [~~(d)~~] Licenses must be renewed by submitting a [~~license~~] renewal application to the department [~~Board~~], paying the required fee, and meeting any additional requirements of the department [~~Board~~] under §7.123 of this title [~~Section 593.3~~] (Insurance Requirements) and subsection (g) [~~(h)~~] of this section, 30 days prior to the license expiration date. Submitting a renewal application after the license expiration date makes the license renewal application subject to late fees [~~prescribed in the Texas Structural Pest Control Act, Section 1951.310~~]. A [~~license~~] renewal application is not considered to be submitted unless it is entirely completed and correct, submitted with the correct fees, and satisfying any additional requirements determined by department [~~Board~~] rules. Applicants who apply for a renewal license more than 60 days after the license expiration date will be required to be reexamined [~~by the Board~~] to obtain a license.

(d) [~~(e)~~] Licenses issued by the department may [~~Board must~~] not be transferred, borrowed, rented, leased or loaned.

(e) [~~(f)~~] Whenever a licensee changes the mailing address, business location address or telephone number, the licensee must notify the department [~~Board~~] in a written or electronic manner within ten (10) business days of the effective date of the change. A license [~~License~~] may be reprinted upon payment of a fee.

(f) [~~(g)~~] The department [~~Board~~], in determining whether additional testing or training must be required of current licensees before renewal of their license, may consider changes in technology, pesticide related problems, the performance of individual licensees or competency of individual licensees. If general retraining or retesting is required for all applicators in a category or subcategory, the department [~~Board~~] will publish notice at least six months in advance of the license renewal date. If individual retraining or testing is required as a result of the applicator's performance or inability to perform, the department [~~Board~~] may give notification and set a time and place of retraining.

(g) [~~(h)~~] All certified applicators are required to certify to the department on the renewal application [~~Board~~] the number of [~~category(ies) of~~] continuing education credits they have accumulated in each category during the prior calendar [~~previous~~] year, running from January 1 to December 31, pursuant to §7.134 [~~§593.23~~] of this title (relating to Continuing Education Requirements for Certified Applicators). Failure to do so will prevent the license from being renewed.

(h) [~~(i)~~] Certified noncommercial applicators who have been licensed for a minimum of two years [~~one year~~] may become certified commercial applicators by requesting an additional license or change of license and paying the required license fee. Certified commercial applicators may become certified noncommercial applicators by requesting an additional license or change of license and paying the required license fee.

§7.127. Fees.

(a) Applicants, licensees and continuing education providers will be charged the following fees:

(1) - (9) (No change.)

(10) a [~~$37.50 for late~~] renewal fee for applications received 1 day to 30 days after expiration date equal to 1-1/2 times the normally required renewal fee;

(11) a [~~$75 for late~~] renewal fee for applications received 31 to 60 days after expiration date equal to 2 times the normally required renewal fee; and

(12) (No change.)

(b) (No change.)

§7.128. Loss of Responsible Certified Applicator or Business License Holder.

(a) In the event of disability, incapacity, or death of the business license holder [~~or certified applicator, if they are the same person~~], and upon application of heir [~~or license holder~~] electing to continue

the business or noncommercial operation, the Director [~~Board~~] may allow the operation to continue [~~issue a temporary hardship license to be valid~~] for a period not to exceed six (6) months. The department must be notified [~~heir or license holder must notify the Board~~] in writing within twenty (20) business days of the disability, incapacity or death of the business license holder [~~or certified applicator~~].

(b) Upon the disability, incapacity, death or loss of a responsible certified applicator, or certified applicator for a noncommercial operation, the business license holder or the noncommercial operation, may request that the Director allow the operation to continue until the next examination date or a reasonable time period as determined by the Director. The department must be notified in writing within twenty (20) business days of the date of the disability, incapacity, loss or death of the certified applicator. [~~Upon the loss, disability or incapacity of a certified applicator, the business license holder or noncommercial operation may request the Board allow the operation to continue operating until the next state examination date. The licensee must notify the Board in writing within twenty (20) business days of the date of the loss, disability or incapacity of the certified applicator.~~]

(c) In the event the Director grants the request for a business or facility to operate for a period of time without the presence of a responsible certified applicator or certified applicator, the operation may only apply general use pesticides during the granted period or until a responsible certified applicator or certified applicator, as appropriate, is employed and /or designated.

§7.129. Licensing of Persons with Criminal Backgrounds.

(a) The department performs criminal background checks on each applicant for examination or a license. Applications to examine for or receive a license, including a renewal, may be delayed as the result of evaluating any criminal activity revealed by this criminal background check.

(b) No currently incarcerated person is eligible to obtain or renew a pest control license.

(c) [~~(a)~~] The department [~~Board~~] may revoke, suspend, annul, or amend an existing [~~valid~~] license, disqualify a person from receiving or renewing a license, or deny to a person the opportunity to be examined for a license because of a person's conviction of a felony or a misdemeanor, if the crime directly relates to the performance of the occupation or activity for which the license is issued and the prior criminal conviction directly affects such person's present fitness to perform such occupation or activity. [~~No currently incarcerated person will be eligible to obtain or renew a pest control license.~~]

(d) [~~(b)~~] In determining whether a criminal conviction directly relates to the performance of a licensed occupation or activity, the department [~~Executive Director~~] shall consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes for requiring a license to engage in the occupation;

(3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.

(e) [~~(c)~~] In making a determination in a particular case, the crimes which the department [~~Board~~] considers as likely to be directly related to the performance of the licensed occupation or activity include, but are not limited to:

(1) any felony or misdemeanor of which fraud, dishonesty, or deceit is an essential element;

(2) any criminal violation of Texas Structural Pest Control Act (Occ. Code Chpt. 1951);

(3) any criminal violation of statutes regulating the particular occupation or activity for which licensing is sought;

(4) any crime involving moral turpitude;

(5) murder;

(6) burglary;

(7) robbery;

(8) sexual assault;

(9) theft;

(10) sexual assault of a child;

(11) possession of controlled substances;

(12) assault;

(13) larceny;

(14) multiple convictions for the same crime; and

(15) falsification of a government document.

(f) [~~(d)~~] In determining whether a criminal conviction directly affects a person's present fitness to hold a license under the Texas Structural Pest Control Act, the department [~~Board~~] shall consider the following factors:

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person at the time of the commission of the crime;

(3) the amount of time that has elapsed since the person's last criminal activity, or release from a penal institution or court supervision;

(4) the conduct and work activity of the person prior to and following the criminal activity;

(5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or following release;

(6) other evidence of the person's present fitness, including letters or recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the person; the sheriff and chief of police in the community where the person resides; and any other persons in contact with the convicted person.

(g) [~~(e)~~] It is the responsibility of the applicant to the extent possible to secure and provide to the department [~~Board~~] the recommendations of the prosecution, law enforcement, and correctional authorities. The applicant must also furnish proof in such form as may be required by the department [~~Board~~] that the applicant has maintained a record of steady employment, supported dependents, maintained a record of good conduct, and paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which convicted.

§7.133. Technician License Requirements.

(a) [~~Definition.~~] An apprentice [~~in any of the categories administered by the Texas Structural Pest Control Board~~] is a beginning employee, whose training program is the responsibility of the responsible certified applicator and who may be trained by and work [~~works~~]

under the direct supervision of licensed applicators and technicians [~~trained and licensed personnel~~].

(b) An apprentice must [~~Must~~] be at least 16 years of age.

(c) An apprentice must [~~Must~~] be able to demonstrate proficiency in reading U.S. Environmental Protection Agency approved pesticide labels and warnings.

(d) An apprentice must [~~Must~~] submit an application for technician license within ten (10) days of beginning employment.

(e) The application must include the following information:

(1) - (4) (No change.)

(5) driver's license number; and

(6) date of birth.[~~; and~~]

[~~(7) disclosure of criminal background.~~]

(f) (No change.)

(g) An apprentice card will be issued by the department [~~Texas Structural Pest Control Board~~] for one (1) year from the date employment began when all of the above requirements are met and processed.

(h) Apprentices must not perform any pest control work without the physical presence of a licensed technician or a certified applicator. Upon completion of and documentation of the required study and on-the-job training and demonstrating competency in each area, [~~Documentation of training given must be entered on the verifiable training form within five (5) days. Upon completion of the following study and on-the-job training,~~] the apprentice may work alone so long as a certified applicator is physically present for personal instruction three (3) days a week. The studies and job training required for an apprentice are as follows:

(1) complete at least two hours of classroom training in each of the following subjects:

(A) - (I) (No change.)

(J) non-chemical pest control techniques, including biological, mechanical and integrated pest management [~~prevention~~] techniques.

(2) complete forty (40) hours of verifiable on-the-job training and eight (8) hours of classroom training in each category in which the apprentice is to provide pest control services. The responsible certified commercial applicator or certified noncommercial applicator [~~business license holder, certified commercial applicator or the certified noncommercial applicator~~] must certify in the training records of each apprentice [~~employee~~] that the apprentice has completed the required training and has demonstrated competency in each category in which the apprentice is to provide service.

(3) (No change.)

(4) an apprentice may [~~must~~] maintain an apprentice card for a maximum of twelve (12) months. If an apprentice has not passed the requirements to become a licensed technician in the twelve (12) month period, the individual may be re-registered [~~re-apply~~] as an apprentice and complete all training requirements for an apprentice. Previous training credit may not be applied to this requirement.

(i) Apprentice Records.

(1) The responsible certified commercial applicator [~~business licensee~~] or certified noncommercial applicator must maintain the verifiable training records and certification for each apprentice in the business files. These are to be kept at least five (5) [~~two (2)~~] years from the training or certification date [~~after termination of employment~~].

(2) The above records are to be kept on a form prescribed by the department [~~Board~~] and must include, but are not limited to the following:

(A) - (C) (No change.)

(D) printed name, signature and license number of trainer [~~and license number~~];

(E) designation of on-the-job training or classroom training; [~~and~~]

(F) competency evaluation by the certified applicator; and[~~.~~]

(G) printed name, signature and license number of evaluator.

(j) When an apprentice changes employers, the employer whomaintains [~~provided~~] the verifiable training records must make the verifiable training records available to the apprentice or the new employer within twenty (20) days of written request.

(k) (No change.)

(l) An apprentice becomes a licensed technician by;

(1) completing a department [~~Board~~] approved technician training course in general training at least one time prior to taking the examination.

(2) making a passing grade on the technician examination.

(A) (No change.)

(B) There shall be a fee charged per examination [~~category~~].

(C) The Technician Training Manual may be obtained from the Texas AgriLife Extension Service [~~Texas Cooperative Extension~~].

(D) An individual must pass each category [~~of the~~] examination in which the apprentice applies [~~has trained~~] to become licensed. Re-examination is not necessary if the license is renewed annually.

[~~(E) Examination dates and locations are at the discretion of the Board.~~]

(3) (No change.)

(m) All testing procedures shall be governed by §7.125 [~~§593.5(c)(3) - (11)~~] of this title (relating to Examinations).

(n) The department [~~Board~~] shall require as a condition to the renewal of each commercial or non-commercial technician's license granted pursuant to the provisions of this section, the responsible certified applicator of record to [~~will~~] certify on the verifiable training records form that the technician has completed eight (8) hours of verifiable training for the preceding calendar year running from January 1 to December 31 preceding the renewal date except that no additional training will be required in the first calendar year in which a technician is first licensed. This certification must be verified upon each annual renewal of the technician license. Failure to do so will prevent the license from being issued. Licensees must obtain the appropriate number of verifiable training hours in the preceding 12-month calendar year period. Changing employers or moving to an inactive status does not alleviate this responsibility or add time to the continuing education requirements.

(1) The eight (8) hours of verifiable training must be selected from [~~will be covered in~~] the following subject areas:

(A) - (I) (No change.)

(J) Non-chemical pest control techniques including biological, mechanical and integrated pest management [~~prevention~~] techniques.

(2) - (3) (No change.)

(4) A technician will receive an hour for hour credit if a department [~~Board~~] approved continuing education unit course is completed.

(5) (No change.)

(o) Upon written request, the [~~Executive~~] Director may grant a hardship extension to a technician due to extenuating circumstances.

(p) All verifiable training records must be made available to the department [~~Board~~] upon request. These verifiable training records must be kept on a format provided by the department [~~Board~~] in the business file for at least five (5) [~~two (2)~~] years after completion of training [~~termination of employment~~].

(q) (No change.)

§7.134. Continuing Education Requirements for Certified Applicators.

(a) Except as provided in subsections (e) and (f) of this section, the department [~~Board~~] shall require as a condition to the renewal of each certified applicator license granted pursuant to the provisions of this section, that the holder thereof certify to the department [~~Board~~] that the licensee has completed courses of continuing education approved by the department [~~Board~~] that cover the applicator's category(ies) of certification for the preceding calendar year running from January 1 to December 31. This certification must be completed each calendar year for renewal of the certified applicator's license in the following calendar year. [~~Failure to do so will prevent the license from being renewed.~~] Certified applicators who do not meet the recertification requirements will not be eligible to renew their licenses until all deficiencies are corrected, and they re-take and pass the appropriate category examination. Licensees must obtain the appropriate number of continuing education units in each 12-month calendar year period as specified in this section. Changing employers or moving to an inactive status does not alleviate this responsibility or add time to the continuing education unit requirement.

(b) - (d) (No change.)

(e) Applicators will not be required to obtain units during the first calendar year in which their license is issued. Applicators who become certified in additional categories during any calendar year period will not be required to obtain units in those categories for that period.

(f) Upon written request, the [~~Executive~~] Director may grant a hardship extension to a certified applicator due to extenuating circumstances. The length of the hardship is at the discretion of the [~~Executive~~] Director.

(g) Each certified applicator must keep a certificate of completion for each course attended for a period of five (5) [~~two~~] years, and submit such records to the department [~~Board~~] on request. These records are subject to inspection by department [~~Board~~] personnel at any time. Continuing education certificates will be made available to the licensee within twenty (20) days of the written request to a training provider. A copy of employee training records shall be made available to a licensee within twenty (20) days upon written request to the employer.

(h) The business licensee, responsible certified commercial applicator and certified noncommercial applicator shall be responsible for the proper certification and maintenance of employee training records in accordance with this subchapter.

[~~(h) The penalty for falsifying continuing education records is a fine of $2500 to $5000, a revocation of a license for a minimum of one (1) year and re-testing by the certified applicator.~~]

(i) Certified applicators found not able to certify their required training on the renewal application [~~in compliance~~] will have twenty (20) days to produce the required certificates of completion for courses previously attended prior to the initiation of enforcement proceedings. Certified applicators who do not meet the recertification requirements will have their licenses suspended in all deficient categories for one (1) year or until all deficiencies are corrected, and they must then re-qualify by taking the certification examination.

§7.135. Criteria and Evaluation of Continuing Education.

(a) The department [~~staff~~] shall evaluate continuing education programs, and assign the number of category units for each one. No more than one unit will be assigned for any fifty (50) minutes [~~hour~~] of net actual instruction time. A course may be approved for a maximum of two (2) consecutive years. After a maximum of two (2) years, any previously approved course must have substantial changes in order to qualify for continuing education credit. The department [~~staff~~] will consider the learning objectives, technical information given, the accuracy of the information, the relevance of the information to structural pest control, the qualifications of the instructor, and the amount of actual training or self-study time devoted to each program in the process of evaluation. Each continuing education program, including self-study and electronic courses submitted for approval must contain the following:

(1) - (6) (No change.)

(b) If the speaker, self-study course provider or electronic provider has not been previously approved, the minimum requirements to qualify as a speaker, course presenter, self-study or electronic course provider are:

(1) (No change.)

(2) five (5) years experience as an applicator certified by the department [~~Texas Structural Pest Control Board~~] with a current license in the category to be taught; or

(3) (No change.)

(4) a combination of education, work related training, and teaching experience which, in the opinion of the department [~~Board~~], would be equivalent to two of the three requirements as previously stated.

(c) Any person seeking approval of a training course must submit the information required at least thirty (30) days prior to the first day of presentation or first offering of an electronic or self-study course. The department [~~Executive Director~~] may waive this requirement due to special circumstances. The department [~~staff~~] must evaluate and recommend credits within thirty (30) days from the date submitted.

(d) Parts of courses, which focus on promotion of products, policies, or procedures of a company, cannot be included for units. Courses and instructors may be re-evaluated at the [~~Board's~~] discretion of the department. Any changes to courses must be submitted to the department [~~Board~~] thirty (30) days prior to the date of presentation.

(e) The department [~~Executive Director~~] may [~~direct the staff to~~] re-evaluate its approval of a course or speaker under the provisions of subsection (a) and (b) of this section.

(f) The department [Board] may enter into a memorandum of agreement with a state or professional society or association to recognize the state's pesticide applicator recertification of the society's professional applicator recertification or satisfaction of the requirements of this section for commercial and noncommercial applicator recertification only if:

(1) (No change.)

(2) the agreement reduces duplication of effort and does not increase the recordkeeping burden of the department [Board].

(g) A certified applicator may submit the information required in §7.135(a), (2), (4) and (5) [§593.24(a), (2), (4) and (5)] the names of instructors and verification of attendance for any course attended by the certified applicator which was not previously approved within thirty (30) days of attendance of the course. The department [Board staff] will notify the certified applicator of any units awarded.

(h) - (k) (No change.)

(l) The sponsor must maintain course completion records for five (5) [two (2)] years and a list of participants must be forwarded to the department [Board] within twenty-one (21) days of completion of the training course. The list [List] must contain name of sponsor, course title and course number(s), number of units awarded, speaker name and number(s), name of attendee and license number, if applicable.

(m) A non-refundable annual fee is due for each course taken into consideration for approval. Courses may be considered on a two-year basis if the course presenter submits a fee of $40.00 for each year at the time of submission. Course will be approved for a maximum of two (2) consecutive years. Governmental agencies are exempt from this fee if the course is presented as a part of the legally mandated function of the agency or the main purpose is education.

(n) (No change.)

(o) "Sponsor" means the person, company or organization that compiles, organizes, writes and/or produces category specific training courses to be given at a training seminar submitted to the department [Texas Structural Pest Control Board] for approval as continuing education program for recertification units. The sponsor is responsible for establishing procedures for verification of completion and comprehension of its courses, and for awarding course completion certificates. The sponsor is [must be] responsible for the qualifications, competence and performance of the authors, speakers, presenters, or instructors who produce or present its courses, and for performance of self-study course examination.

(p) Videotapes, slides or other media presentations shall not be approved by the department [Board] unless accompanied by a qualified speaker and course outline, as required by subsection (a) and (c) of this section or unless approved as a self-study course under subsection (h) of this section.

(q) Personnel of the department [Texas Structural Pest Control Board] are exempt from any fee charged for a continuing education program if they are monitoring the program as a part of the duties of their employment.

(r) A course may be approved as a self-study or electronic course if it meets the following additional criteria:

(1) attendees must take an examination designed to verify their knowledge of the material provided in the course. The course sponsors must grade the examination and keep records for a minimum of five (5) [two (2)] years.

(2) (No change.)

(3) the examination for a self-study course must be proctored by the course provider or person responsible to the course provider. The examination location must be made available and accessible to department [Board] staff.

(4) a self-study course examination proctor must be a certified applicator licensed by the department [Texas Structural Pest Control Board]. Anyone serving as an examination proctor may not take a verification exam for credit while serving as a monitor. The department [Board] must be notified to time, physical address, and city two weeks prior to each self-study course examination. The department [Executive Director] may waive this requirement upon written request by the applicant taking the self-study course.

(s) - (t) (No change.)

(u) The department [Executive Director] may re-evaluate or cancel a currently approved continuing education course during the calendar year for failure to comply with the elements of the course as outlined in this section.

[(v) The penalty for a sponsor or speaker falsifying an application for recertification record can be as much as $5000. A penalty of $5000 per incident may be imposed to a sponsor of a continuing education course for the following:]

[(1) Failure to notify the Board of course presentation as required in subsection (a)(3) of this section.]

[(2) Failure to submit a list of participants to the Board as required in subsection (l) of this section.]

[(3) Failure to issue a certificate of completion to each applicator after course completion as required in subsection (k) of this section.]

[(4) Providing a certificate of attendance to a certified applicator licensee who did not attend and/or complete the course requirements.]

[(5) Falsely claiming to have conducted a continuing education course.]

[(6) Failure to conduct a continuing education course for the required unit of time.]

[(7) Making a sales promotion during the instructional period of the continuing education course.]

[(w) Any continuing education provider who violates this section can have the provider privileges revoked or suspended.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803257
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4076

♦ ♦ ♦

4 TAC §§7.130, 7.132, 7.136

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of

the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of §§7.130, 7.132 and 7.136 is proposed under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

Occupations Code, Chapter 1951, is affected by the proposal.

§7.130. Licensing of Persons with Delinquent Student Loans.

§7.132. Right-of-way Certification.

§7.136. Provisional License for Louisiana and Mississippi Certified Structural Pest Control Applicators Affected by Hurricane Katrina.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803256
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4076

♦ ♦ ♦

DIVISION 3. COMPLIANCE AND ENFORCEMENT

The Texas Department of Agriculture (the department) proposes amendments to Chapter 7, Subchapter H, Division 3, §§7.141 - 7.149, 7.153, 7.154 - 7.156; new §7.150; and the repeal of §§7.150, 7.151, 7.157, and 7.158, all concerning regulation of structural pest control. The amendments, repeals and new section are proposed to eliminate unnecessary sections and to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill 2458, 80th Legislative Session, 2007, which transferred the responsibilities of the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Changes are made throughout the sections for purposes of clarification and to make the sections consistent with the transfer of the regulation of structural pest control to the department. Section 7.141 is amended to require that a structural pest control license must only be presented for visual inspection to a customer or to the department or Department of State Health Services staff upon request and to allow a license to be laminated as long as the required content is not obscured or modified. Section 7.142 is amended to clarify that a business must inform the department of all licensees and apprentices employed or terminated and where employee training records will be maintained. Section 7.143 is amended to clarify the employee supervision requirements for the responsible certified applicator and to clarify the conditions under which a technician and apprentice may perform pest control services without physical supervision. Section 7.144 is amended to require that the responsible certified applicator is responsible for maintaining pest control records and adds that the license number of the person applying the pesticide be maintained in the use records. The section is also amended to require that use records be maintained for a period of five years due to the change in the inspection frequency from two to four years by HB 2458.

Section 7.145 is amended to incorporate the reference of the contact information for the department. Section 7.146 is amended to provide requirements for the content of and posting of a pest control sign. Section 7.147 is amended to add that the posting sign for residential rental property in excess of 5 rental units be posted in areas of common access for residents, to add that indoor treatment information at an institutional facility extends to residents and that parents, guardians or managing conservators of schools or day care centers may receive prior notice of indoor and outdoor application information upon request. Section 7.148 is amended to clarify the term "adjacent" and to add that the Consumer Information Sheet at an institutional facility extends to residents, and that parents, guardians or managing conservators of schools or day care centers may receive prior notice of indoor and outdoor application information upon request. Section 7.149 is amended to specify the frequency of inspection change from 2 to 4 years for business licensees, except that new business licensees shall be inspected within the first year of operation. The section is also amended to add new language that allows the department to conduct more frequent inspections using a risk-based set of criteria as provided by HB 2458. Section 7.153 is amended to repeal language relating to the designation as a Reduced Impact Pest Control Service. New language allows entities who have previously qualified to be designated as a Reduced Impact Pest Control Service to continue to do so under the provisions in effect prior to the effective date of these rules, for a period not to exceed three calendar years. Section 7.154 is amended to correct the name and address of the regulating agency. Section 7.155 is amended to correct the name and address of the regulating agency and to coordinate requirements for school districts to those in 7.150. Section 7.156 is amended to add new language that provides for disciplinary action for licensees that interfere with the entry or access to property, equipment or records by department personnel in conducting its responsibilities under this chapter. Section 7.150 is repealed in its entirety and a new 7.150 is adopted to specify requirements for school districts to follow in implementing an Integrated Pest Management Program as provided by HB 2458. This section includes new continuing education requirements and training requirements for newly appointed integrated pest management coordinators employed by school districts. Section 7.151, relating to Misapplications, §7.157, relating to Investigation of Complaints, and §7.158, relating to Investigation Reports, are no longer needed because the subjects are covered by other department rule or policy.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposed amendments and repeals are in effect, there will be no fiscal implications for state government as a result of enforcing or administering the amended, repealed and new sections, as proposed. There will be a cost to local government as a result of new training requirements proposed in §7.150 for Integrated Pest Management (IPM) Coordinators employed by local school districts.

The estimated cost per year for the 156 school districts participating in the program will be: for newly appointed IPM Coordinators, an average cost of $261 for initial training and an average cost of $87 per year for the following four years; and an average continuing education cost of $87 per year for all existing IPM Coordinators.

Mr. Bush also has determined that, for each year of the first five years the proposed amendments and new sections are in effect, the public benefit anticipated as a result of enforcing the amended sections will be updated regulations in regard to keeping of records, posting requirements for areas treated that extend to residents, and establislhment of a risk-based inspection schedule to allow the department to identify and concentrate on higher risk licensees. In regard to proposed new §7.150, relating to Schools, the public benefit will be better trained Integrated Pest Management Coordinators working in school districts, more clearly defined categories of pesticides and application restrictions for each, and an immediate benefit to school districts and students from more clearly defined IPM Guidelines. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the amended sections as proposed. The cost of training and continuing education for newly appointed Integrated Pest Management Coordinators imposed by new §7.150 will be paid by local independent school districts who employ these individuals, and do not affect microbusinesses or small businesses. Therefore, no regulatory flexibility analysis is required.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register*.

4 TAC §§7.141 - 7.150, 7.153 - 7.156

The amendments to §§7.141 - 7.149 and 7.153 - 7.156 and new §7.150 are proposed under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; §1951.207, which authorizes the department to adopt a policy by rule that requires a business holding a structural pest control business license to be inspected by a field inspector at least once in the business's first year of operation and every four years after the first year of operation and provides for additional inspections based on a schedule of risk-based inspections; §1951.212, which authorizes the department to establish standards for an integrated pest management program for the use of pesticides, herbicides, and other chemical agents to control pests, rodents, insects, and weeds at the school buildings and other facilities of school districts and by rule shall establish categories of pesticides that a school district is allowed to apply; §1951.452, which provides that department may require each license holder to make records, as prescribed by the department, of the license holder's use of pesticides; §§1951.153 - 1951.155, which provide for posting of notice of treatments and distribution of consumer information related to structural pest control treatments; §1951.156, which provides that the department shall develop a policy to implement and enforce §§1951.453 - 1951.455; and Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

The code affected by the proposal is Occupations Code, Chapter 1951.

§7.141. License Display.

(a) [~~All structural pest control licenses must be displayed in a conspicuous place at the business of the license holder. In the case of a nonresident license holder, the license must be displayed in a conspicuous place at the residence or at the place of business of the license holder's resident agent.~~] All structural pest control licenses must be presented for visual inspection to a customer or to the department [~~Board, Texas Department of Agriculture,~~] or Department of State Health Services staff upon request. A licensee must also carry a license card while engaged in structural pest control work. The license card may be laminated as long as the content is readable and is not modified in the process of lamination.

(b) The business license number and branch suffix letter must be prominently displayed on all vehicles used in the company business. The business license number and branch suffix letter shall not be required on unmarked management vehicles. A management vehicle is defined as a vehicle not used to perform sales, or provide service to customers. Company vehicles may have more than one license number and branch suffix letter if a written request is made to the Director [~~Board~~] and the] Director [~~Board~~] approves the request. The numbers and letters must be permanently affixed to the vehicle in a prominent place on each front fender and/or front door panel in no less than two-inch letters in a color which would contrast to the background color of the truck or vehicle and shall be designated as: Texas Pest Control License (number). This may be abbreviated to TPCL (number). Any numbers, letters or symbols that adhere to vehicle by way of a magnetic device are not considered to be permanently affixed. [~~Management vehicle is defined as a vehicle not used to perform sales, or provide service to customers.~~]

§7.142. Employee Registration.

(a) It shall be the duty of the business licensee or certified noncommercial applicator to inform the department [~~Board~~] in writing of the employment and termination of all licensees and apprentices.

(b) Notice of employment must be furnished within ten (10) days of the date of employment and must include the full name and license number, if applicable, of the employee [~~home address of the certified applicator, technician or apprentice~~], the date of employment, and the location where the employee training records will be maintained[~~, if applicable, the branch office where the licensee or apprentice will be employed~~], and other information as may be required. This notice must be provided on a form as prescribed by the department [~~Texas Structural Pest Control Board~~].

[~~(c) When employing a certified applicator or technician, the business licensee or certified noncommercial applicator must obtain from the Board a license for such certified applicator or technician. Any registration of license fees paid for technicians and apprentices will not be refundable or transferable.~~]

(c) [~~(d)~~] Notice of termination must include the employee name, license number and date of termination, and be provided to the department [~~Texas Structural Pest Control Board~~] within ten (10) days of the date of termination.

§7.143. Employee Supervision.

(a) The responsible certified applicator is responsible for the supervision and training of all licensed or registered personnel and the handling, storage and [~~to supervise the~~] use of pesticides and devices by all employees of a pest control business.

(b) In order to provide adequate supervision, the responsible certified applicator or a designated certified applicator must be physically present to give personal instructions to a technician or apprentice at least three (3) days a week [~~with the technician or apprentices being supervised~~]. The technician or apprentice must [~~reside within the normally accepted commuting area of the licensed business office or work location and must~~] personally report to a certified applicator at least three (3) days a week to receive instructions.

[~~(c) Employees may not schedule and perform pest control work unless instructions for the type of work to be done are obtained from a certified applicator.~~]

(c) [~~(d)~~] Apprentices must not perform pest control services without physical supervision until they have completed all classroom training, required on-the-job training, have demonstrated proficiency [~~required~~] and verification has been entered [~~verified such completion~~] in their records by a licensed applicator.

(d) [~~(e)~~] The business license holder, and the responsible certified commercial applicator or certified noncommercial applicator shall be [~~is~~] responsible for actions of employees when they are performing pest control operations [~~services~~].

§7.144. Pest Control Use Records.

(a) The responsible certified applicator [~~business licensee~~] or, in the case of the certified noncommercial applicator, the certified applicator shall ensure that [~~must keep and maintain a~~] correct and accurate records [~~record~~] of all uses of pesticides and pest control devices registered with the United States Environmental Protection Agency and the department are maintained [~~Texas Department of Agriculture or approved by the Board under §599.1 of this title~~] for a period of five (5) [~~two (2)~~] years. Said records must be kept on the premise of the business licensee or, in the case of a certified noncommercial applicator, the employer's premises. The records must include, but are not limited to:

(1) - (2) (No change.)

(3) total amounts of each pre-formulated pesticide applied where the percentage of active ingredient was not changed [~~as formulated by the manufacturer or devices used~~];

(4) device used and total number of each device;

(5) [~~(4)~~] for manufacturer's formulations that are mixed with water or other material, the mixing rate and total amount of material applied or the percent of active ingredient(s) and total amount of material applied;

(6) [~~(5)~~] purpose for which the pesticides or devices were used or target pest;

(7) [~~(6)~~] date the pesticides or devices were used;

(8) [~~(7)~~] service address where the pesticides and devices were used, except that for utility pole re-treatments, records shall be kept for the location of each pole treated; and

(9) [~~(8)~~] [~~and~~] the name, and license number of the person(s) applying pesticides or using devices or name of the technician or apprentice and license number of the supervising certified applicator if the technician or apprentice have not been assigned a license or registration number.

(b) If a physical device [~~approved by the Board~~] is used, the appropriate unit of measurement (square foot, cubic foot, or linear foot) of the physical device must be recorded and a diagram describing the installation will be provided.

(c) These records shall be made available to the department [~~Board~~] or its authorized agents upon written or verbal request [~~in accordance with the Texas Structural Pest Control Act~~].

§7.145. Contracts.

(a) Each written contract, warranty, service agreement, termite disclosure document or guarantee of a business regulated by the department [~~Texas Structural Pest Control Board~~] must contain [~~the name, address and telephone number of the Board~~] on the face of the document[~~. It must also include~~] the business name, business license number and letter, location address or mailing address, telephone number in 12 point type or larger and the statement "Licensed and regulated by: Texas Department of Agriculture, P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481, (FAX) 888-232-2567" in 10 point type or larger. [~~under the Texas Structural Pest Control Act.~~]

(b) (No change.)

(c) The requirement in subsection (a) and (b) of this section must be legible [~~and printing shall be in at least eight-point type~~].

§7.146. Pest Control Sign.

(a) (No change.)

(b) A pest control sign must be provided by the licensee to the employer or building manager at least 48 hours prior to a planned indoor treatment at a workplace. A workplace is defined as any nonresidence structure with three or more full-time paid employees which is treated by a licensed business or a certified noncommercial applicator.

(c) A pest control sign must be provided by the licensee to the chief administrator, IPM Coordinator or building manager at least 48 hours prior to a planned indoor treatment at a hospital, nursing home, hotel, motel, lodge, warehouse, food-processing establishment, school or educational institution, or day-care center, other than a restaurant, retail food, or food service establishment. This requirement does not apply for new construction on school campuses where students have not yet been introduced.

(d) (No change.)

(e) A person may not be considered in violation of this section if the space to be treated is vacant, unused and unoccupied at the time of treatment, or if extenuating circumstances require an emergency [~~unplanned~~] treatment.

(f) Each pest control sign must be at least 8 1/2 inches by 11 inches in size and [~~must~~] contain the required [~~following~~] information with the first line in a minimum of 24-point type (one-fourth inch) and all remaining lines in a minimum of 12-point type (one-eighth inch). The addition of advertising and logos to the sign [~~Notice of Pest Control Treatment~~] is permissible to the extent that such advertising does not interfere with the purpose of public notification of a pest control treatment. A standard sign in Spanish is available from the department [~~Board~~] upon request. The sign shall [~~should~~] appear in a [~~the following~~] format approved by the department. The text and format of the sign is available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs/, or by contacting the Texas Department of Agriculture at P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481.
[~~Figure: 22 TAC §595.6(f)~~]

(g) In the space marked "For more information call or contact," the telephone number where information on the pesticide(s) used may be obtained must be listed, such as the apartment manager, building manager, IPM Coordinator or pest control operator.

(h) In the space marked "phone number of hotline for pesticide information," the following wording must be used: National Pesticide Information Center 1-800-858-7378.

(i) If a workplace has its own pesticide information center, the workplace center telephone number may be listed rather than the information in subsection (h) of this section.

(j) The pest control sign shall show one of the following:

(1) the intended date of application or a range of dates of intended treatment not to exceed three (3) days; or

(2) the schedule for a regularly scheduled application. Example: the 3rd Thursday of each month.

(k) Any application scheduled or made outside of the posted dates shown in subsection (j)(1) or (j) (2) of this section shall be reposted and notifications shall be made at least 48 hours prior to the intended treatment unless the application is declared an emergency treatment as specified in §7.147 of this title (relating to Consumer Information Sheet).

§7.147. Consumer Information Sheet.

(a) For an indoor treatment at a private residence that is not a rental property the certified applicator or technician must give the consumer [~~pest control~~] information sheet to the owner of the residence before each treatment begins, or, if the owner is not available at the time treatment begins, leave the sheet in a conspicuous place in the residence.

(b) For indoor treatment at a residential rental property with less than five (5) rental units, [~~including a single family, duplex, triplex or four-plex rental property,~~] the certified applicator or technician must leave the consumer [~~pest control~~] information sheet in the residence at the time of each treatment.

(c) For an indoor treatment at a residential rental property with five (5) or more rental units, the certified applicator or technician must supply the consumer [~~pest control~~] information sheet to the owner or manager of the complex. The certified applicator or technician must also supply the owner or manager with a pest control sign. The owner or manager or an employee or agent of the owner or manager, other than the certified applicator or technician, must notify residents who live in [~~the~~] direct or adjacent areas of the treatment by:

(1) posting the sign specified in §7.146 of this title (relating to Pest Control Sign) in an area of common access of residents at least 48 hours before each planned treatment; or

(2) (No change.)

(d) For an indoor treatment at a workplace, the certified applicator or technician must supply the consumer [~~pest control~~] information sheet and a pest control sign to the employer or the building manager. The employer or the building manager or an employee or agent of the owner or manager, other than the certified applicator or technician, must notify [~~the~~] individuals [~~who work~~] at the workplace of the date of the planned treatment by:

(1) posting the sign in an area of common access that the employees [~~individuals~~] are most likely to see [~~check on a regular basis~~] at least 48 hours before each planned treatment; and

(2) providing the consumer information sheet to any individual working in the building on request of the individual if the request is made during normal business hours.

(e) For an indoor treatment at a building that is a hospital, nursing home, hotel, motel, lodge, warehouse, food-processing establishment, school or educational institution, or a day-care center, the certified applicator or technician must supply the consumer [~~pest control~~] information sheet and a pest control sign to the chief administrator, IPM Coordinator or building manager. The chief administrator, IPM Coordinator or building manager must notify the individuals who work, reside in the building of the treatment by:

(1) posting the sign in an area of common access that the individuals are likely to check [~~on a regular basis~~] at least 48 hours before each planned treatment; and

(2) providing the information sheet to any individual working , residing in the building on request of the individual.

(f) Personnel at a school or educational institution or a day-care center are required to inform the parents, guardians, or managing conservators of the children attending the school or day-care center, at the time the child is registered, that:[~~;~~]

(1) the school, institution, or center periodically applies pesticides indoors and outdoors; and

(2) prior notice and information on the application of the pesticides is available from the school, institution, or center at the written request of the parents, guardians, or managing conservators.

(g) For the purpose of this section, if the primary purpose of a perimeter treatment of a premises is to augment or supplement an indoor treatment, or is performed in lieu of an indoor treatment for a particular pest or pests by preventing the entry or re-entry of pests into the interior of the premises, then the perimeter treatment shall be considered an indoor treatment. [~~For the purpose of this section, treatment is an indoor treatment even though the treatment may include a perimeter treatment of the building if the primary purpose of the treatment is to treat the inside of the building.~~]

(h) The department's [~~official Texas Structural Pest Control Board~~] Consumer Information Sheet must be used. Copies of the Consumer Information Sheet are available from the department [~~Board~~] in English and Spanish and are available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs/, or by contacting the Texas Department of Agriculture at P.O. Box 12847, Austin, TX 78711-2847, Phone 866-918-4481. The department's Consumer Information Sheet may be copied and used in accordance with this section. [~~and must read as follows:~~]
[~~Figure: 22 TAC §595.7(h)~~]

(i) The pre-notification requirements of subsections (c), [~~and~~] (d) and (e) of this section are waived if the customer and certified applicator sign a statement attesting to the fact that an emergency exists which requires immediate treatment. If such an emergency exists, the Consumer Information Sheet must be provided by the licensee at the time of treatment. The statement must be kept on file with the pest control use records [~~at the business license location. Certified noncommercial applicators may attest to an emergency by signing a statement attesting to the emergency and must keep the statement on file with the pest control use records at their place of employment~~]. If the customer is not available to sign a statement at the time of treatment, that shall be recorded in the use records along with the customer's name and telephone number [~~must be noted in the pest control use records~~]. An emergency is defined as an imminent hazard to health or property or an imminent infestation. An [~~and~~] emergency treatment is limited to the localized area of the emergency.

(j) Licensees holding the lawn and ornamental or weed categories may use [~~the following~~] text provided by the department in place of that required in subsection (h) of this section.[~~:~~] This text is available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs, or by contacting the Texas Department

of Agriculture at P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481.
[~~Figure: 22 TAC §595.7(j)~~]

(k) Any consumer may waive receipt of the Consumer Information Sheet for multiple treatments by signing or initialing below the following statement: "I have received one copy of the Consumer Information Sheet for all treatments to be provided as a part of this pest control service agreement. I may receive additional copies at any time upon request to the service provider, and will receive any updates to the Consumer Information Sheet which may occur." A licensee [~~pest control operator~~] must keep a copy of this statement in the pest control use records for each customer covered by the agreement.

§7.148. Responsibilities of Unlicensed Persons for Posting and Notification.

(a) Owners or managers of residential rental properties with five (5)or more units must either:

(1) post a pest control sign at least 48 hours before the planned treatment in an area of common access to residents; or

(2) distribute the consumer information sheet to each unit planned to be treated and each unit adjacent to those planned to be treated at least 48 hours before the planned time of treatment. Adjacent means having a common wall, ceiling, or floor and any area sharing a common ventilation system. Area of common access means a common area that an individual is likely to check on a regular basis, such as building entranceway, mailboxes, laundry rooms, beverage machines, building bulletin boards, etc.

(b) Employers, building managers, IPM Coordinators and chief administrators of workplaces, hospitals, nursing homes, hotels, motels, lodges, warehouses, food-processing establishments, school or educational institutions, and day-care centers must post a pest control sign in an area of common access at least 48 hours prior to each planned treatment and provide a Consumer Information Sheet to any individual working or residing in the building at the request of that individual. Area of common access means a common area that an individual is likely to observe [~~check~~] on a regular basis, such as building entranceway, mailboxes, laundry rooms, beverage machines, building bulletin boards, etc. This requirement does not apply to new construction on school campuses where students have not yet been introduced.

(c) Chief administrators or the IPM Coordinator of schools [~~school~~] or educational institutions and day-care centers must notify the parents or guardians of children attending the facility in writing that pesticides are periodically applied indoors and outdoors, and that information on the times and types of applications and prior notification is available upon request. Such notification must be made at the time of the child's registration.

(d) The 48 hour pre-notification requirements of subsections (a) and (b) of this section may be waived if an emergency exists and the customer and certified applicator sign a statement attesting to the fact that an emergency exists that requires immediate treatment. The statement must be kept on file with the pest control use records at the business license location. [~~If the customer is not available to sign a statement at the time of treatment, the customer's name and telephone number must be noted in the pest control use records.~~] Certified non-commercial applicators may attest to an emergency by signing a statement attesting to the emergency and must keep the statement on file with the pest control use records [~~at their place of employment~~]. An emergency is defined as an imminent hazard to health or property or an imminent infestation and emergency treatment is limited to the localized area of the emergency.

(e) A person may not be considered in violation of this section if a pest control sign is removed by an unauthorized person or if the space to be treated is vacant, unused and unoccupied at the time of treatment.

[~~(f) A person found in violation of this section is subject to the administrative penalty provisions of the Texas Structural Pest Control Act.~~]

§7.149. Inspections.

(a) Each licensed pest control business shall be inspected at least once in the business's first year of receiving a license and at least every four years thereafter. School districts will be inspected at least once every five (5) years. The department may waive these requirements due to staff availability, budgetary constraints, or inspection trends or operational efficiencies. Businesses and school districts demonstrating a lack of compliance with department rules may be inspected more frequently than every four years for businesses and every five years for districts based on risk using the following elements of consideration: [~~Each licensed pest control business shall be inspected at least one time every two years. Businesses showing a lack of compliance with Board law or rules may be inspected more frequently. The Executive Director may waive this requirement due to emergency. An emergency in this section is defined as a shortage of staff availability due to complaint investigations, personnel shortages, or budgetary constraints.~~]

(1) prior violations;

(2) prior inspection results;

(3) type and nature of business;

(4) size and location of a school district;

(5) prior complaints.

(b) Risk-based inspections will be scheduled based on the following criteria:

(1) High Risk. Inspection schedule: not later than 180 days. This includes businesses or districts with a history of engaging in pest control operations or practices that could be injurious to public health, safety or the environment.

(2) Moderate Risk. Inspection schedule: not later than one (1) year. This includes businesses or districts with a substantiated complaint history and a history of significant lapses in licensing, record keeping and insurance.

(3) Concerned Risk. Inspection schedule: not later than three (3) years. This includes businesses or districts with a history of complaints whether substantiated or not and repeat non-compliance of an administrative nature.

[~~(b) If the Board or the Executive Director determines that a misapplication of pesticides has occurred on the premises of a consumer, the consumer and the business license holder or applicator must be notified within 20 calendar days of the making of this determination. Records of any health injuries diagnosed by a licensed physician and property damage caused by any misapplication by a licensee which is found by the Board shall be kept in a form reportable to the Department of State Health Services or any institution of higher education upon their request.~~]

[~~(c) Procedures for the conduct of an investigation shall be contained in the Texas Structural Pest Control Board Investigations Manual, which shall contain all requirements of the Texas Structural Pest Control Act.~~]

§7.150. Schools.

(a) School Districts. Each school district shall establish, implement and maintain an Integrated Pest Management (IPM) Program that provides for high-quality pest control using the least hazardous methods necessary to protect district students, faculty, visitors, facilities and grounds with the least cost and environmental impact. IPM is an ecological approach to pest management in which all available and compatible techniques are used to manage pest populations at levels sufficient to maintain a safe and healthy learning environment. The school district is responsible for the IPM Coordinator(s) compliance with these regulations. The IPM program shall meet the essential elements described in these rules.

(1) The IPM program must be established by policy adopted by the school board and a copy maintained in both central districts files and files of the IPM Coordinator(s). The policy must be based on the generally accepted best management practices of IPM, which include, but are not limited to:

(A) effective strategies that rely on the best combination of pest management tactics that are compatible with human health and environmental protection;

(B) proper identification of pest problems;

(C) monitoring programs to determine when pests are present or when pest problems are severe enough to justify corrective action;

(D) setting threshold pest levels to define unacceptable levels of pest presence;

(E) the use of non-chemical management strategies, methods and techniques such as pest-proofing and building maintenance, as first option whenever practical and feasible; and

(F) preferential use of the least-toxic chemical controls when pesticides are necessary.

(2) Each school district shall appoint an IPM Coordinator(s) to implement the school district's IPM policy. No later than 90 days after the district designates or replaces an IPM Coordinator(s), the district must report to the department the newly appointed coordinator's name, address, telephone number and e-mail address and the effective date of the appointment. A district that appoints more than one IPM Coordinator shall designate a Responsible IPM Coordinator who will have overall responsibility for the IPM program and provide oversight of subordinate IPM Coordinators regarding IPM policy and decisions.

(3) Each school district must employ or contract with a licensed applicator, who may, if an employee, also serve as the IPM Coordinator(s).

(4) Each school district shall ensure a procedure is in place to provide prior notification of pesticide applications in accordance with this chapter, to individuals who request in writing to be notified of such applications. Telephonic, written or electronic notification will meet this requirement.

(b) IPM Coordinator(s). The IPM Coordinator(s) shall be responsible for the proper and full implementation of the District IPM Program and compliance with these regulations, and;

(1) the IPM Coordinator(s) must successfully complete a department approved IPM Coordinator training course within six months of appointment.

(2) the IPM Coordinator(s) must obtain at least six hours of department approved IPM continuing education units credit every three years, beginning the effective date of this rule or the date of designation, whichever is later.

(3) ensure that all IPM Program records including policy changes, work orders, inspection reports, complaints, use of non-chemical management strategies, and records of pesticide applications are maintained for a period of five (5) years and presented to a department inspector upon request.

(4) the IPM Coordinator(s) shall oversee and be responsible for:

(A) coordination of pest management personnel, ensuring that all school employees who perform pest control, including those employees authorized to perform incidental use applications, have the necessary training, are equipped with the appropriate personal protective equipment, and have the necessary licenses for their pest management responsibilities;

(B) maintaining facility inspection reports and a prioritized list of structural and landscape improvements to ensure that exclusion areas are addressed when resources are available.

(C) working with district administrators to ensure that pest control contract proposal specifications are compatible with IPM principles and that pest control contractors work under the guidelines of the district IPM policies;

(D) ensuring that all pesticides used on district property have current pesticide labels except as provided for in these rules, that copies of Material Safety Data Sheets and pesticide labels are maintained in the IPM files and are made available for public viewing upon request;

(E) authorizing and ensuring least toxic, emergency treatments in consultation with the certified applicator as provided for under these rules;

(F) handling requests and inquiries relating to pest problems, and maintain records of any pesticide related complaints;

(G) informing school district administrators and other personnel about IPM requirements (e.g., training requirements, pre-notification and posting requirements, sanitation, re-entry intervals, and pesticide storage); and

(H) approving all pesticide applications, including the approval of emergency applications at buildings and on district grounds in accordance with these rules.

(I) Maintaining a copy of pesticide use records in the IPM files when pesticide applications are made by contracted pest control services and not by district personnel.

(c) The certified applicator or licensed technician shall:

(1) use non-chemical management strategies, methods and techniques as first consideration;

(2) apply only properly labeled pesticides, specific for the target pest, except as provided in these rules;

(3) recommend or oversee structural pest management technical needs of the district by following the district's IPM policy and department regulations;

(4) obtain written approval from IPM Coordinator(s) for the use of any pesticides in the yellow or red categories;

(5) document and forward complaints relating to pest problems, IPM activities or pesticides to the IPM Coordinator(s);

(6) consult with the IPM Coordinator(s) concerning the use of control measures in buildings and grounds;

(7) ensure that all pest control activities are consistent with school district's written pest management policy.

(d) Pesticide Use In School Districts:

(1) Pesticide applications may be made on district property only after the use of non-chemical pest management strategies have been considered.

(2) Pest control signs shall be posted at least 48 hours prior to a pesticide application in building and at least 12 hours prior to application on district grounds and will remain posted during the application and until the end of any required re-entry time limit.

(3) Pesticides used on school property shall be mixed outside of student occupied areas of building and grounds.

(4) Students and personnel non essential to the application shall not be allowed in area(s) where pesticides are applied at the time of application or during the re-entry time limits in a building or school grounds except as otherwise stated in this section.

(e) Pesticide category and application restrictions:

(1) Green Category Pesticides.

(A) Definition: general use pesticides which may have a Caution signal word or no signal word (EPA toxicity categories III and IV) that's active ingredients are derived from borates; silica gels; diatomaceous earth; nonvolatile insect and rodent baits in tamper resistant containers; pesticidal soaps; gels, paste or baits for crack and crevice treatment only; microbe-based pesticides; pesticides made with essential oils but without synthetic pyrethroids, with 5% synergists or less.

(B) Approval for Use: Green category pesticides do not require prior written approval unless such approval is required in the district's IPM policy and may be applied at the licensee's discretion.

(C) Restrictions: Green category pesticides may not be applied if students are present in the room or if outdoors, within 50 feet at the time of treatment. Re-entry into the area is permitted as soon as the application is complete, or after the specified re-entry time on the pesticide label, whichever interval is longer.

(2) Yellow Category Pesticides.

(A) Definition: all other general-use pesticides bearing a CAUTION signal word not described in paragraph (1) of this subsection.

(B) Approval for Use: certified applicators or licensed technicians must receive and file in application records, prior written approval from the IPM Coordinator for the application of yellow category pesticides.

(C) Restrictions:

(i) yellow category pesticides that are formulated as liquids, dusts or aerosols or that pose risk of volatizing, splashing, or drifting from the application site, may be applied in school buildings if students are not present and are not expected to be present in the same room for the next 6 hours. Re-entry of the treated area may be granted after 6 hours or after the spray has dried or after the specified re-entry time on the pesticide label, whichever interval is longer.

(ii) yellow category pesticides may be applied to outdoor school grounds if students are not present within 50 feet of application site and the area is secured from re-entry for no less than 6 hours and the spray has dried or the specified re-entry time on the pesticide label, whichever interval is longer.

(iii) treated areas must be clearly marked and secured using a locking device, a fence or other practical barrier or monitored to keep individuals out of the secured area until the allowed re-entry time.

(3) Red Category Pesticides.

(A) Definition: Any EPA labeled pesticide bearing a Warning or Danger signal word.

(B) Approval for Use: The use of red category pesticides on district properties requires written approval from the responsible IPM Coordinator. The responsible IPM Coordinator must receive and approve written justification from the certified applicator or licensed technician prior to granting approval for the use of red category pesticides.

(C) Restrictions:

(i) Red category pesticides may be applied in school buildings only if students are not present and are not expected to be present in the room or treated area within the next 12 hours following the application, or the specified re-entry time on the pesticide label, whichever interval is longer.

(ii) Red category pesticides may be applied to outdoor school grounds if students are not present within 100 feet of application site and the area is secured from re-entry in accordance with these rules for no less than 12 hours, or the specified re-entry time on the pesticide label, whichever interval is longer.

(iii) Treated areas must be clearly marked and secured using a locking device, a fence or other practical barrier or monitored to keep individuals out of the secured area until the allowed reentry time.

§7.153. Reduced Impact Pest Control Service.

Business licensees who have received and are using the Reduced Impact Pest Control Service designation may continue to do so under the provisions in effect prior to the adoption of this section for a period not to exceed three (3) calendar years from the date of the effective date of this section.

~~[(a) A business may qualify to use the Reduced Impact Pest Control Services designation by having all certified applicators who will be supervising the service attend a continuing education course approved for Reduced Impact Service. All licensed employees will have verifiable training from a certified applicator who has attended the course and is approved to provide such training.]~~

~~[(b) The goal of Reduced Impact Pest Control Services is to effectively control pests and to provide customer satisfaction while seeking to minimize individual's exposure to chemical pesticides through the application of Integrated Pest Management principles.]~~

~~[(c) A business using the Reduced Impact Pest Control Service designation must meet the following requirements;]~~

~~[(1) The Board approved Consumer Information Sheet must be used and it must be provided at the time of inspection.]~~

~~[(2) An inspection must be performed prior to any pest control treatment. The inspection report must include:]~~

~~[(A) A description of all areas inspected.]~~

~~[(B) A description of conditions conducive to infestation and/or evidence of active infestation with recommendations for non-chemical solutions to those problems.]~~

~~[(C) A description of any treatment performed and the reason for the treatment recommendations and reasons for chemical~~

application must be consistent with the goal of Reduced Impact Pest Control Services. Customer request is an appropriate reason, provided the inspection report informs the customer of practical and feasible alternatives which would result in less exposure to chemical pesticides. For each application recommended, specify whether a target pest is actually present or the application is a preventative one.]

[(3) The customer must provide, in writing in the contract, authorization for treatment and the names of any specific pesticides which are not to be used or if no pesticides are to be used in providing service. This must be done prior to the initiation of service. This information must be kept in the pest control use records.]

[(4) A copy of the written inspection report must be provided at the time of each service and a copy must be kept in the pest control use records.]

[(d) Notwithstanding §595.13 of this title (relating to Advertising), the following words may be used in a advertisement for services by a business authorized to provide Reduced Impact Service; Reduced Impact Service; Reduced Impact Methods; Reduced Impact Techniques; Reduced Risk Methods; Reduced Hazards; Reduced Exposure; Reduced Impact Specialist; Environmentally Sensitive Services; Environmentally Sensitive Programs; Environmentally Friendly; Environmentally Sound; Environmentally Aware; Environmentally Responsible or any other words descriptive of the service which are not specifically listed as prohibited in §595.13 and which can be substituted by the business's adherence to the goals of Reduced Impact Service.]

[(e) A business licensee and employees of a business licensee who are found to be in violation of any provisions of this section may, in addition to all other applicable sanctions, lose the Reduced Impact authorization held by the business licensee.]

[(f) Licensees holding the Reduced Impact authorization and licensed in the lawn and ornamental or weed categories may use the following text in place of that required in §595.7.]
[Figure: 22 TAC §595.14(f)]

§7.154. Incidental Use Situation Fact Sheet.

(a) The [Texas Structural Pest Control Board] Incidental Use Fact Sheet must contain the following text: "This fact sheet must be distributed to all city, county, and state employees who apply general use pesticides and are not licensed by the Texas Department of Agriculture [and do not have a Texas Structural Pest Control Board noncommercial applicator's or technician license]. The fact sheet and instruction must be provided upon initial employment and thereafter must be available as needed. These general use pesticides include insecticides, herbicides, fungicides and rodenticides and involve applications made both inside and outside of structures. Incidental Use is not intended for long term [terms] or extensive pest control measures. Where long term pest control is required, a trained, licensed person is to make the applications. Incidental Use is defined as "A pesticide application on an occasional, isolated, site-specific basis that is incidental to the primary duties of an employee and involves the use of general use pesticides after instruction as provided by rules adopted by the department [Texas Structural Pest Control Board]". Examples of Incidental Use Situations are treating fire ants in a transformer box, or treating of ants by a janitor or clerical employee in a break area. Incidental is defined as site-specific and incidental to the employee's primary duties. If it is a part of the employee's primary duty to make applications of pesticides, that employee is required, by law, to obtain [either] a [Texas Structural Pest Control Board license or Texas Department of Agriculture] license, depending on the location and type of application. In all cases of incidental use, the employee should use the least hazardous, effective method of controlling pests. If chemicals are to be utilized, they must be applied in strict accordance with manufacturer labels of "General Use" products being used. Applications made inconsistent with the label requirements of the general use product may result in penalties being assessed against the individual and/or the certified noncommercial applicator or technician responsible. "Incidental Use Situation" applications of pesticides are regulated by the department [Texas Structural Pest Control Board]. If you have any questions or comments, contact the department [Board] at (512) 305-8250; written inquiries may be addressed to the Texas Department of Agriculture [Structural Pest Control Board] , P.O. Box 12847 [1927], Austin, Texas 78711-2847 [78767-1927]." [Copies are available from the Texas Structural Pest Control Board.]

(b) - (d) (No change.)

§7.155. Incidental Use For Schools.

(a) The [Texas Structural Pest Control Board] Incidental Use Situation For Schools Fact Sheet must contain the following text: "This fact sheet must be distributed to all employees of school districts who apply general use Green Category [List] products [(or Yellow List products specific to bee and wasp applications)] and are not licensed by the Texas Department of Agriculture [and do not have a Texas Structural Pest Control Board noncommercial applicator's or technician license]. The fact sheet, instruction and training must be provided upon initial employment by the school district's IPM Coordinator, and thereafter must be available as needed. These [general use] Green Category [List] pesticides include insecticides only and involve applications made both inside and outside of structures. Incidental Use is not intended for long term or extensive pest control measures, rather emergency situations where safety of students or workers is at risk and there is insufficient time to contact a licensed applicator. Where long term pest control is required, a trained, licensed person is to make the applications. Examples of Incidental Use situations are treating fire ants in a transformer box or treatments for bees or wasps as a non-routine application to protect children or personnel. Incidental Use is defined as site-specific and incidental to the employee's primary duties. If it is part of the employee's primary duty to make applications of pesticides, that employee is required, by law to obtain [either] a [Texas Structural Pest Control Board license or] Texas Department of Agriculture license, depending on the location and type of application. In all cases of Incidental Use, the employee should use the least hazardous, effective method of controlling pests. All applications to schools or school grounds must be in compliance with school district IPM policies. If chemicals are utilized, they must be applied in strict accordance with manufacturer labels of "General Use" products [on the Green or Yellow List products] being used. Applications made inconsistent with the department [Texas Structural Pest Control Board] Law and Regulations, or applications made inconsistent with the label requirements of the [general use] product may result in an enforcement action [penalties] being taken [assessed] against the individual and/or the certified applicator or technician responsible. "Incidental Use Situation" applications of pesticides are regulated by the Texas Department of Agriculture [Structural Pest Control Board]. If you have any questions or comments, contact the Department of Agriculture, phone number 1-866-918-4481 or [Board at (512) 305-8250 inquiries may be addressed to the Texas Structural Pest Control Board] P.O. Box 12847 [1927], Austin, Texas 78711-2847 [78764-1927]." [Copies are available from the Texas Structural Pest Control Board.]

(b) - (c) (No change.)

(d) Pest control use records must be kept by IPM Coordinator(s) for all Incidental Use applications including reason for application and justification for emergency for five (5) [two (2)] years.

(e) Incidental Use in school districts is limited to insecticides and rodenticides that are Green Category [and Yellow list] products.

§7.156. Entry and Access.

(a) Authorized employees of the department [~~Board~~] may conduct investigations and inspections of structural pest control activities involving any person in this state to determine compliance with the Act and department [~~Board~~] rules.

(b) In conducting [~~these~~] investigations, the employees may[~~, with proper permission~~]:

(1) enter the premise of a licensee, business or facility during normal business hours to examine records, question witnesses, inspect pesticides and equipment use for pest control, and collect samples;

(2) enter premises where individuals [~~licensees~~] are performing or are suspected of performing pest control operations to inspect the use of pesticides and devices, check employee credentials, collect samples, identify pests, and inspect equipment; and

(3) on public property, inspect pesticides and equipment and question employees of persons conducting or suspected of conducting structural pest control activities.

(c) Any licensee who interferes with an employee of the department attempting to enter or access property, equipment or records for purposes of this chapter shall be subject to disciplinary action up to and including revocation of licenses and/or registrations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803258
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

4 TAC §§7.150, 7.151, 7.157, 7.158

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of §§7.150, 7.151, 7.157, and 7.158, is proposed on under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators, and certified noncommercial applicator's conducting structural pest control activities; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

The code affected by the proposal is Occupations Code, Chapter 1951.

§7.150. Schools.

§7.151. Misapplications.

§7.157. Investigation of Complaints.

§7.158. Investigation Reports.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803259
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

DIVISION 4. UNLAWFUL ACTS AND GROUNDS FOR REVOCATION

4 TAC §§7.161 - 7.163

The Texas Department of Agriculture (the department) proposes amendments to Chapter 7, Subchapter H, Division 4, §§7.161 - 7.163, relating to structural pest control. The amendments are proposed to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill 2458, 80th Legislative Session, 2007, which transferred the responsibilities of the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Sections 7.161 - 7.163 are amended to change the name and address of the oversight agency from the Board to the department, to correct citations to rules and laws and to clarify procedures for granting and setting of hearings on appeals of a revoked or suspended license is the Commissioner of Agriculture.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections, as amended.

Mr. Bush also has determined that, for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of administering and enforcing the amended sections will be providing updated references and citations. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the amended sections as proposed. Therefore, no regulatory flexibility analysis is required.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register.*

The amendments to §§7.161 - 7.163 are proposed under Occupations Code, §1951.501, which establishes disciplinary powers of commissioner relating to structural pest control; §1951.502, which provides that the department shall establish procedures

under which a person may appeal the agency's notice of suspension and request a hearing; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

The code affected by the proposal is Occupations Code, Chapter 1951.

§7.161. Grounds for Revocation, Suspension, Penalties, Reprimanding, Refusal to Examine, Refusal to Issue or Renew Licenses.

Any such action may be accomplished by the department [~~a vote of the Board,~~] after notice and hearings, as provided for by Occupations Code, Chapter 1951 [~~Texas Civil Statutes~~] and the Administrative Procedures [~~Procedure and Texas Register~~] Act Texas Government Code, Chapter 2001. No revocation, suspension, annulment, or withdrawal of any license is effective unless prior to the institution of department [~~agency~~] proceedings, the department [~~agency~~] gave notice by personal service or by [~~registered or~~] certified mail to the licensee of facts or conduct alleged to warrant the intended action, and the licensee was given the opportunity to show compliance with all requirements of law for the retention of the license. The following are grounds for revocation, suspension, penalties, reprimanding, refusal to examine, and refusal to issue or renew licenses:

(1) - (2) (No change.)

(3) engaging in an advertising practice prohibited in §7.152 [~~Section 595.13~~] of this title (relating to Advertising); advertising services which the licensee is not authorized to provide; engaging in false, misleading or deceptive acts or practices; or advertising in an unauthorized category;

(4) has been convicted or has pleaded guilty to a violation of the [~~this~~] Act as amended, or any regulation adopted hereunder, or any of the laws or regulations of this state, another state, or the United States, relating to the licensing of pest control operators and pesticide use;

(5) has been convicted of or has pled guilty to a felony or misdemeanor involving moral turpitude, under the law of this state and other states of the United States within seven years prior to the date of application, provided that when the applicant is a defendant in any action in which the defendant is charged with a felony or a misdemeanor involving moral turpitude, the department [~~Board~~] may delay processing of the application until final disposition of any such criminal proceedings;

(6) has a criminal background as explained in §7.129 [~~§593.9~~] of this title (relating to Licensing of Persons with Criminal Backgrounds);

(7) failure of the licensee to supply the department [~~board~~] or its authorized representative, upon request, with true and accurate information concerning methods and materials used, or work performed, or other information essential to the public health and welfare and to the administration and enforcement of the [~~this~~] Act;

(8) - (12) (No change.)

(13) failure to make records of pesticide use and keep them available as required by the Act, as amended, and §7.144 [~~§595.4~~] of this title (relating to Pest Control Use Records);

(14) failure of business licensee to notify the department [~~board~~] when a certified applicator or apprentice leaves their employment;

(15) (No change.)

(16) failure to print in proper size type the address and telephone number of the department [~~Board~~] and the statement that the business is licensed and regulated by the Texas Department of Agriculture [~~board has jurisdiction over individuals licensed by the board and the Act~~];

(17) failure of business licensee or certified noncommercial applicator to notify the department [~~Board~~] of a change of address of their company or organization;

(18) failure of a business licensee or certified noncommercial applicator to give the department [~~Board~~] an address where licensee may be located;

(19) (No change.)

(20) failure of certified applicator licensee, technician or apprentice to notify the department [~~Board~~] when he or she moves or changes employers;

(21) - (25) (No change.)

(26) failure to comply with a final order of the Commissioner [~~Texas Structural Pest Control Board~~];

(27) Permitting, aiding, abetting or conspiring with a person to intentionally violate or circumvent a law or regulation enforced by the department [~~Texas Structural Pest Control Board~~];

(28) (No change.)

(29) Any violation of the regulations promulgated under this subchapter [~~Section 599~~] relating to treatment standards;

(30) (No change.)

(31) failure to comply with §7.135 of this title (relating to [~~§593.24,~~] Criteria for Evaluation of Continuing Education);

(32) failure to comply with §7.150 of this title (relating to [~~§595.11,~~] Schools); [~~and~~]

(33) failure to comply with any section of the Act or these regulations [~~Regulations~~]; and

(34) failure to provide a disclosure document prior to, or accompanying, or at the same time, with a written estimate as described in §7.174 [~~§599.4~~] of this title (relating to Termite Treatment Disclosure Documents).

§7.162. Suspension or Revocation.

(a) Suspension or revocation of any license under the provisions of §7.161 [~~Section 597.1~~] of this title (relating to Grounds for Revocation, Suspension, Penalties, Reprimanding, Refusal to Examine, Refusal to Issue or Renew Licenses) shall not be for less than ten (10) days nor more than two years at the discretion of the department [~~board~~]. If a license is suspended or revoked under the provisions thereof, the licensee shall, within five days of such suspension or revocation, surrender all licenses and identification cards issued there under to the director or his authorized representative.

(b) [~~A person possessing a license issued by the Board may have that license suspended or revoked without a hearing.~~] A licensee who is notified that the department [~~Board~~] intends to suspend or revoke the licensee's license must ask for a hearing by filing a petition with the Commissioner [~~Executive Director~~] or his designee within twenty (20) days of the date of the letter sent to the licensee. The petition shall set out legal basis and supporting facts for challenging the department's [~~Board~~] decision and the relief sought by the petitioner including a request for hearing. Upon receipt of the petition, if the Commissioner [~~Executive Director~~] or his designee determines that the petition is within the jurisdiction of the department [~~Board~~], the Com-

missioner [~~Executive Director~~] or his designee shall request a hearing before the State Office of Administrative Hearings [~~(SOAH)~~].

§7.163. Unlawful Acts.

In addition to the offenses listed in the Texas Structural Pest Control Act (the Act), Occupations Code Chapter 1951, §7.161 [~~§597.1(1)-(3) and (7)-(26)~~] of this title (relating to Grounds for Revocation, Suspension, Penalties, Reprimanding, Refusal to Examine, Refusal to Issue or Renew Licenses) are unlawful acts. Any person who commits an unlawful act is subject to the criminal, civil, and administrative penalties provided by the Act as well as the remedies provided in this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803260
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

DIVISION 5. TREATMENT STANDARDS

The Texas Department of Agriculture (the department) proposes amendments to Chapter 7, Subchapter H, Division 5, §§7.172 - 7.178, and the repeal of §7.171, all concerning regulation of structural pest control. The amendments and repeal are proposed to eliminate an unnecessary section and to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill (HB) 2458, 80th Legislative Session, 2007, which transferred the responsibilities of the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Section 7.172 is amended to clarify the information required to appear on a durable sticker upon completion of a termite treatment or installation of a baiting system to include the size of the sticker, the telephone number of the business licensee, name and license number of the applicator and the date of the treatment or installation of the baiting system. The section is also amended to require that a copy of the Termite Treatment Disclosure Document be maintained for a period of five years instead of the existing two year requirement. Section 7.173 is amended to delete references to a U.S. Environmental Protection Agency (EPA) registered wood treatment termiticide and to delete language specifying product specific research for registered wood treatment termiticide products. This amendment is made to make this section consistent with existing federal requirements pertaining to the registration requirements for termiticides. The requirement to maintain a copy of the pre-construction treatment record is changed from two years to five years to be consistent with the maintenance of other records required under this chapter as necessitated by the change in the inspection frequency of business licensees by HB 2458. The language specifying the administrative penalty amount and process used for violations of this section are deleted to allow the department to incorporate the enforcement process used for its other regulatory programs to also include structural pest control. Section 7.174 is amended to clarify the requirements for the information to be included in termite treatment disclosure documents. Section 7.175 is amended to delete the requirement that a certified applicator approve a Wood Destroying Insect Report conducted by a technician licensed in the termite category. Section 7.178 is amended to clarify the requirements for structural fumigation and add language to require when the certified applicator must be present at the site during fumigation; clarifies that local authorities may be notified by telephone if a record is made containing the name of the person informed and the date and time of the notification; add language that the certified applicator shall post a person or persons to guard the location from the time the fumigant is introduced until the ventilation level is reached and that all entrances are secured until the structure is released for occupancy; modify the information that must be contained in the fumigation report to include the business license number, delete the type of roof, delete the type of sealing method, add the license number of the certified applicator, and add the date released for occupancy; and clarify calibration information requirements and change the proof of calibration to be maintained for five years instead of the current two year requirement. Section 7.171 is repealed because other current laws, procedures, processes, and policies allow the department to fully and adequately address any issues arising in this regulatory area.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections, as proposed.

Mr. Bush also has determined that, for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal will be updated and clear regulations, and better protection to the public when licensees are performing structural fumigation operations. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. Therefore, no regulatory flexibility analysis is required.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

4 TAC §7.171

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of §1.171 is proposed under Occupations Code §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; §1951.205, which provides that the department, shall adopt rules governing the methods and practices of structural pest control that the department determines are necessary to protect the public's health and welfare and prevent adverse effects on human life and the environment; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules

of practice stating the nature and requirements of all available formal procedures.

The code affected by the proposal is Occupations Code, Chapter 1951.

§7.171. Termite Control.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803261
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

4 TAC §§7.172 - 7.178

The amendments to §§7.172 - 7.178 are proposed under Occupations Code §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; §1951.205, which provides that the department shall adopt rules governing the methods and practices of structural pest control that the department determines are necessary to protect the public's health and welfare and prevent adverse effects on human life and the environment; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

The code affected by the proposal is Occupations Code, Chapter 1951.

§7.172. Subterranean Termite Post Construction Treatments.

(a) - (b) (No change.)

(c) All treatments must strictly adhere to the procedures outlined in the disclosure statement required in §7.174 [~~§599.4~~] of this title (relating to Termite Treatment Disclosure Documents). A deviation will be permitted when unexpected circumstances occur necessitating a change in the treatment and the certified applicator responsible for the treatment provides the customer with a written addendum to the contract or disclosure documents at the completion of the treatment.

(d) Upon completion of a termite treatment, or installation of a baiting system [~~other than a bait treatment~~], the company responsible for providing the treatment must leave a durable sticker of not less than one (1) inch by two (2) inches in size on the wall adjacent to the water heater, electric breaker box, beneath the kitchen sink or in the interior bath trap access giving the name, [~~and~~] address and telephone number of the business licensee, name and license number of the applicator, product used, method or device used, the [~~final~~] date of the treatment or installation of the baiting system, and a statement that the notice should not be removed.

[~~(e) For a termite treatment using a bait product, the requirement to place a durable sticker applies at the time of the first placement of bait systems that include a pesticide.~~]

(e) [~~(f)~~] The business license holder or, in the case of the certified noncommercial applicator, the applicator must keep and maintain a correct and accurate copy of the Termite Treatment Disclosure Documents for a period of five (5) [~~two (2)~~] years.

§7.173. Subterranean Termite Pre-Construction Treatments.

(a) Subsections (b) - (f) do [~~does~~] not apply to baits or baiting systems and subsections (c) - (d) do not apply to wood applied termiticide products.

(b) (No change.)

(c) For a full treatment, the entire structure must be treated to provide a continuous horizontal and vertical barrier. The [~~as described on the pesticide label including the posting of a treatment sticker and the~~] final treatment shall [~~to~~] be performed within thirty (30) days of notification of completion of landscaping or one year from the date of completion of construction, whichever comes first. However, when construction has proceeded to the point that all areas cannot be treated before the company providing the treatment is called to perform the application, a partial treatment is [~~will be~~] permitted if the owner of the structure or the person in charge of the construction and the licensee [~~certified applicator~~] for the pest control company sign a statement attesting to the construction conditions, and attach it to the contract with an amended diagram or blueprint or building plat showing the exact areas to be treated and send copies to the owner of the property within seven (7) days of the application. A copy of the contract with an amended diagram or blueprint or building plat showing the exact areas to be treated must be made available to the department [~~Board~~] upon [~~the Board's~~] request. A partial treatment will also be permitted if allowed by label directions and if the licensee proposing the treatment issues a Termite Treatment Disclosure Document prior to the treatment.

(d) (No change.)

(e) A primary treatment of the wood framing following full label application instructions for barrier treatment protection must be performed with a [~~U.S. Environmental Protection Agency registered wood treatment~~] termiticide that has specific label instructions to be used as a primary treatment to offer protection for prevention of subterranean termites in new construction. This treatment may be used in lieu of a full, partial, or bait treatment and must include providing a barrier application to exposed surfaces of wood framing with exterior sheathing in place but before any walls are enclosed to a height of not less than two (2) feet above a contact with a slab foundation or a (2) foot horizontal and vertical treatment of wood above contact with a concrete crawlspace or basement foundation. Label instructions must provide a barrier application for the prevention of subterranean termite intrusion and tubing onto non-cellulose areas around bath-traps, plumbing penetrations and concrete foundation areas. [~~The registered wood treatment termiticide must be supported by a minimum of five years of product specific research for the prevention of subterranean termites that has been conducted by the USDA Forest Service or an accredited university study. U.S. Environmental Protection Agency registered wood treatment termiticide products that do not meet these requirements may only be used in conjunction with a full, partial, or bait treatment if allowed by the product label.~~]

(f) Notice of all pre-construction treatments with contracts requiring treatment of a structure other than a single family dwelling must be called, e-mailed or faxed in to the department [~~Texas Structural Pest Control Board~~] between the hours of 6:00 a.m. and 9:00 p.m. using the specified e-mail address, telephone number or fax number at least four (4), and no more than twenty four (24) hours prior to a termiticide application. The licensee must provide address and site location, type of treatment (partial or full), date and time of treatment, approximate and appropriate unit of measurement used under contract and the name and

the license number and physical address of the pest control company [~~business licensee~~]. If the treatment is cancelled, notice of cancellation must be sent using the specified telephone number, e-mail address or fax number within one hour of the time the pest control company [~~licensee~~] learns of the cancellation.

(g) For all commercial pre-construction treatments, the licensee must maintain records of the appropriate unit of measurement treated per application site, amount of termiticide used per application site, rate at which termiticide is mixed for each application site, number of application tanks which were in use for the treatment, the capacity, in gallons, of each application tank, and the start and stop time for the treatment. The business license holder or, in the case of the certified noncommercial applicator, the applicator must keep and maintain a correct and accurate copy of the pre-construction treatment records for a period of five (5) [~~two (2)~~] years. A baiting system may be used in lieu of a pre-construction treatment if installed [~~applied~~] within thirty (30) days of notification of completion of landscaping. If a physical device is used, the appropriate unit of measurement of the physical device must be recorded and a diagram describing the installation must be provided.

[~~(h) Any violation of this section may result in an administrative penalty of up to $3000 per violation and is considered a base penalty 3.~~]

§7.174. Termite Treatment Disclosure Documents.

(a) (No change.)

(b) Each termite treatment disclosure document must include, but is not limited to:

(1) a diagram or blueprint or building plat and description of the structure or structures to be treated to include the following:

(A) (No change.)

(B) [~~approximate~~] perimeter measurements of the structure as accurately as practical;

(C) - (D) (No change.)

(2) - (4) (No change.)

(5) the concentration of [~~any liquid~~] termiticide [~~application to be~~] used [~~on the treatment~~] or minimum number of bait stations [~~baiting systems~~] to be installed.

(6) for subterranean termite post construction treatments the following statements and definitions in at least 12-point [~~8-point~~] type: A termite treatment may be a partial treatment or spot treatment using termiticide, [~~chemical or~~] approved physical barriers or a baiting system. These types of treatments are defined as follows:

(A) - (C) (No change.)

(D) Spot Treatments. Any treatment which concerns a limited, defined area less than ten (10) linear or square feet that is intended to protect a specific location or "spot". Often there are adjacent areas that are susceptible to termite infestation which are not treated.

(E) Baiting Systems. This type of treatment may include interior and/or perimeter placement of monitoring or [~~of~~] baiting systems along with routine inspection intervals. The baiting technique may include one or more locations as prescribed by the product label and instructions.

(F) (No change.)

(7) For all termite treatments the following statement in at least 12-point [~~8-point~~] type: For all treatments there will be a diagram showing exactly what will be treated. Treatment specifications and warranties for those treatments may vary widely. Review the pesticide label provided to you for minimum treatment specification. If you have any questions, contact the pest control company or the Texas Department of Agriculture [~~Structural Pest Control Board~~], P.O. Box 12847, Austin, Texas 78711-2847. Telephone number (866) 918-4481 [~~1927, Austin, Texas 78767-1927. Telephone number (512) 305-8270~~].

(8) For any pre-construction treatment [~~treatments~~], the Proper Pre-construction Subterranean Termite Treatments - A Guide for Builders and Consumers, [~~Board-approved Termite Pretreatment Disclosure Document (SPCB/D-4)~~] must be provided to, and signed by, the contractor or purchaser of the pretreatment service prior to the beginning of the treatment. A signed copy must be kept in the pest control use records of the licensee. [~~Failure to provide this document prior to treatment will result in an administrative penalty of up to $3000 per violation.~~] The text and format of the termite pre-treatment disclosure document is available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs/, or by contacting the Texas Department of Agriculture at the address provided in subsection (b)(7) of this section. [~~shall be as follows:~~]
[~~Figure: 22 TAC §599.4(b)(8)~~]

(9) For drywood termite and related insect treatments the following statements and definitions in at least twelve (12) [~~eight (8)~~] point type: A drywood termite or related insect treatment may be a full treatment or spot [~~limited~~] treatment. These types of treatments are defined as follows:

(A) Full Treatment: Generally defined as a treatment to control 100% of the insect infestation by tarpaulin fumigation or appropriate sealing method. A full treatment by fumigation is designed to eliminate every insect colony. It should include the infested structure and all attached structures.

(B) Spot Treatment: Any treatment less than a full treatment by tarpaulin fumigation. This treatment should be considered only when a drywood termite or related insect infestation has a limited and defined area of infestation. Adjacent areas susceptible to dry wood termite or related insect infestations are not treated. Because of the nature of wood destroying insects, these untreated areas may continue to harbor dry wood termites and unrelated insects throughout the structure without detection. [~~Limited Treatment: Any treatment less than full treatment. A treatment which has a limited and defined area that is intended to protect a specific location. Often there are adjacent areas susceptible to dry wood termite or related insect infestations which are not treated. Because of the nature of wood destroying insects, these untreated areas may continue to harbor dry wood termites and unrelated insects throughout the structure without detection.~~]

(10) A consumer information sheet as required by §7.147 [~~§595.7~~] of this title (relating to Consumer Information Sheet).

(c) Before conducting an initial termite treatment [~~for the customer~~], the pest control company proposing the treatment must present the [~~prospective~~] customer or designees with a diagram or blueprint or building plat and description of the structure(s) to be treated including the following:

(1) - (4) (No change.)

(d) For a [~~any~~] retreatment of a property for an existing customer, the pest control company must provide the following before conducting the retreatment:

(1) the label; [~~if different than that used in the preceding treatment(s);~~]

(2) - (3) (No change.)

(4) a consumer information sheet as required by §7.147 [§595.7] of this title.

§7.175. Wood Destroying Insect Report Inspection Procedures.

(a) Inspections for the purpose of issuing a Wood Destroying Insect Report [wood destroying insect report] must be conducted in a manner consistent with the procedures described in this section. Inspections for the purpose of issuing a Wood Destroying Insect Report [wood destroying insect report] must be conducted by a licensed certified applicator or technician in the termite category [and must be approved by a certified applicator upon completion]. The purpose of the inspection is to provide a report regarding the absence or presence of wood destroying insects and conditions conducive to wood destroying insect infestation. The inspection should provide the basis for recommendations of preventive or remedial actions, if necessary, to minimize economic losses. For purposes of a Real Estate Transaction Inspection Report (§7.176 [§599.6]) only, there must be visible evidence of active infestation in the structure or visible evidence of a previous infestation in the structure with no evidence of prior treatment to recommend a corrective treatment. The inspection must be conducted so as to ensure examination of all visible accessible areas in or on a structure in accordance with accepted procedures. While such an examination may reveal wood destroying insects, there are instances when concealed infestations and/or damage may not be discovered. Examinations of inaccessible or obstructed areas are not required.

(b) Inaccessible or obstructed areas recognized by the department [Board] include, but are not limited to:

(1) - (4) (No change.)

(5) areas where [the] storage conditions or locks make inspection impracticable.

(c) The inspector must describe the structure(s) inspected and include the following:

(1) (No change.)

(2) a diagram (does not have to be to scale) showing:[;]

(A) - (B) (No change.)

(C) areas of current [present] wood destroying insect activity;

(D) - (E) (No change.)

(3) (No change.)

(d) - (e) (No change.)

§7.176. Real Estate Transaction Inspection Reports.

(a) All inspection reports issued regarding the visible presence or absence of termites, [and] other wood destroying insects and conditions conducive to infestation of wood destroying insects in connection with a real estate transaction must be made on a form prescribed [and officially adopted] by the department [Board]. Inspection results may be recorded additionally on a form required by a real estate lending provider such as the Veterans Administration as long as the form required by this section is maintained in the inspection files.

(b) The report form will include a space to report conditions consistent with §7.175 [§599.5] of this title (relating to Inspection Procedures).

(c) The Texas Official Wood Destroying Insect Report is available from the Texas Department of Agriculture, may be obtained from the department at P.O. Box 12847 Austin, Texas 78711-2847, and may be downloaded from the department's web page at: http://www.tda.state.tx.us/spcs/. [The Texas Official Wood Destroying Insect Report Form SPCB/T-4 is adopted. The form may be examined in the office of the Texas Register and the Texas Structural Pest Control Board. Forms for reproduction may be obtained from the Texas Structural Pest Control Board office, P.O. Box 1927, Austin, Texas 78767-1927.]

(d) (No change.)

(e) The licensee issuing the report must retain records of inspection reports for a minimum of five (5) [two (2)] years.

§7.177. Posting Notice of Inspection.

(a) Upon completion of an inspection for the purposes of completing the Texas Official Wood Destroying Insect Inspection Report [SPCB/T-4 Form], the inspector must post a durable sticker on the wall adjacent to the water heater, interior of bath trap access, electric breaker box or beneath the kitchen sink giving the name and license number [address] of the licensee or license number of the supervising certified applicator if the technician or apprentice have not been assigned a license or registration number other than the social security number, the date of the inspection [or treatment], a statement that the sticker should not be removed and statement of the product used.

(b) It will be a violation of this section for any licensee [of the Board] to remove or deface a posted inspection sticker.

§7.178. Structural Fumigation Requirements.

(a) Fumigation of structures to control wood destroying insects shall [must] be performed only under the direct on-site supervision of a certified applicator licensed [by the Board] in the category of structural fumigation. Direct on-site supervision means that the certified applicator exercising such supervision must be present at the site of the fumigation during any [the entire] time the fumigants are being released and at the time property is inspected, ventilated and released for occupancy.

(b) Fumigation shall [must] be performed in compliance with all label requirements applicable to state and federal laws and regulations.

(c) Prior to the release of the fumigant [commencement of fumigation], warning signs shall [must] be posted in plainly visible locations on or in the immediate vicinity of all entrances to the space under fumigation and shall [must] not be removed [moved] until [fumigation and ventilation have been completed, and] the premises is determined safe for reoccupancy. Ventilation shall [must] be conducted with due regard for [the] public safety.

(d) When directed by the label, local fire authorities or, when not available, local police authorities, shall [must] be notified in writing, by telephone if a record is made of the name of the person that was informed and the date and time, or by e-mail prior to introduction of the fumigant . The same agency shall be informed that [and at the time] the structure is released for occupancy.

(e) The space to be fumigated shall [must] be vacated by all occupants prior to the commencement of fumigation. The space to be fumigated shall [must] be sealed in such manner to ensure that the [assure] concentration of the fumigant released is [has been] retained in compliance with the manufacturer's recommendations.

(f) Warning signs shall [must] be printed in red on white backgrounds and shall [must] contain the following statement in letters not less than two inches in height:[;] "Danger-Fumigation." Signs [They] must also depict a skull and crossbones, not less than one inch in height, the name of the fumigant, the date and time fumigant was introduced, and the name, license number [address], and telephone number where the certified applicator performing the fumigation may be reached twenty four (24) hours a day.

(g) On any structure that has been fumigated, the certified applicator responsible for the fumigation shall [~~must~~], immediately upon completion, post a durable sticker on the wall adjacent to the electric breaker box, water heater, beneath the kitchen sink or in the interior bath trap access. This must be a durable sticker not less than one inch by two inches in size. It must have the name and license number of the certified applicator, date of fumigation, fumigant used, and the purpose for which it was fumigated (target pest).

(h) A certified applicator performing fumigation shall [~~must~~] use adequate warning agents with all fumigants that [~~which~~] lack such properties. When conditions involving abnormal hazards exist, the person exercising direct on-site supervision shall [~~must~~] take such safety precautions in addition to those prescribed to protect the public health and safety. The certified applicator responsible for the fumigation shall [~~must~~] visibly inspect the structures to assure vacancy prior to introduction of fumigant.

(i) The certified applicator responsible for the fumigation shall [~~must~~] also post a person or persons to guard the location whenever a licensed applicator is not present from the time the fumigant is introduced until [~~all tarpaulins and seals are removed and~~] the label concentration for aeration is reached. The person posted at the location shall deter entry into the structure by routinely inspecting the structure under fumigation at least once each hour. The person posted at the location shall remain alert and on duty as directed by the certified applicator. The certified applicator responsible for the fumigation shall [~~must then~~] secure all entrances to the structure in such a manner as to prevent entry by anyone other than the certified applicator [~~or licensed individual~~] responsible for the fumigation. The structure must remain secured until the structure is released [~~concentration indicated by the fumigant label for release~~] for occupancy [~~is reached~~].

(j) For the purpose of maintaining proper safety and establishing responsibility in handling the fumigants, the business license holder shall [~~must~~] compile and retain for a period of at least five (5) [~~two (2)~~] years a report for each fumigation job and/or treatment. [~~The person posted at the location must deter entry into the structure by routinely inspecting the structure under fumigation at least once each hour. The person posted at the location must be alert and on duty to prevent entry into the structure while the structure while the fumigant is present.~~] The report for each fumigation job or treatment must [~~shall~~] contain the following information:

(1) name, [~~and~~] address and business license number of the pest control company;

(2) (No change.)

~~[(3) type of roof;]~~

(3) [~~(4)~~] cubic feet fumigated;

(4) [~~(5)~~] target pest or pest controlled;

(5) [~~(6)~~] fumigant or fumigants used and amount;

(6) [~~(7)~~] name of warning agent and amount used;

(7) temperature and wind conditions;

~~[(8) type of sealing method;]~~

~~[(9) temperature and wind conditions;]~~

(8) [~~(10)~~] time gas introduced and aerated (date and hour);

(9) [~~(11)~~] name and license number of certified applicator [~~of licensee (certified applicator)~~];

(10) [~~(12)~~] list of any extraordinary safety precautions taken;

(11) [~~(13)~~] date and time released for occupancy (signed by certified applicator);

(12) [~~(14)~~] the dates [~~date~~] and time [~~hour~~] fire or police authorities were notified; and

(13) [~~(15)~~] [~~verification of clearing procedures and~~] identification of clearing devices used.

(k) Fumigations for the purpose of controlling wood destroying insects are subject to the provisions of §7.174 [~~§599.4~~] of this title (relating to Termite Treatment Disclosure Documents).

(l) Every licensee [~~business license holder~~] engaged in application of a fumigant is required to use an approved and calibrated clearance device as prescribed on the fumigant label.

(1) This approved and calibrated clearance device must be used as required by the label. [~~As appropriate, this device must be calibrated in accordance with manufacturer's recommendations.~~]

(2) An independent and qualified facility or person must perform calibration of the clearance device not less than annually and anytime it is suspected to be inaccurate. Calibration must [~~shall~~] be in compliance with the manufacturer's requirements.

(3) Proof of calibration must be kept on file for a period of five (5) [~~two (2)~~] years and available for review by department [~~Board~~] personnel and by placing an annual [~~a yearly~~] validation on the clearance device.

(m) The certified applicator responsible for the fumigation shall [~~must~~] be responsible for following label requirements for aeration and clearing of the structure that is being fumigated.

~~[(n) The word "trained" is defined as a person having the same qualifications as an apprentice unless the label states more stringent requirements in the application of the fumigant.]~~

(n) [~~(o)~~] Notice of all [~~structural~~] fumigations [~~with contracts requiring treatment~~] of a structure must be called, emailed, or faxed to the department [~~Texas Structural Pest Control Board~~] between the hours of 6:00 a.m. and 9:00 p.m., Monday through Friday, using the specified telephone number, email address or fax number at least four (4), and no more than twenty four (24) hours prior to the structural fumigation application. The licensee must provide address and site location, chemical to be used, date and time of treatment, approximate square footage under contract and the name and license number [~~and physical address~~] of the business licensee. If the structural fumigation is cancelled, notice of the cancellation must be sent using the department [~~Board~~] specified telephone number, email address or fax number within three [~~one to six~~] hours of the time the pest control company [~~licensee~~] learns of the cancellation. [~~Any violation of 22 TAC §599.11(o) will result in a fine of up to $3000 based on a penalty matrix and is considered a base penalty 3.~~]

(o) [~~(p)~~] Before an individual may apply for an initial certified applicator's license in the structural fumigation category [~~(with the exception listed in §599.11(r),~~] the following experience requirements must be met:[~~.~~]

(1) Attend a forty (40) hour structural fumigation school that has at least sixteen (16) hours of hands on training, and has been approved by the department [~~Executive Director~~]; or

(2) Obtain forty (40) hours of on-the-job training with at least sixteen (16) hours of hands on training that is approved by the department [~~Executive Director~~].

~~[(3) A minimum of one CEU per year in structural fumigation is required to maintain the certification following initial testing.]~~

(p) [~~(q)~~]Current certified applicators must conduct/perform four (4) hours of training per year to maintain their certification.

(1) A verifiable performance/training records form will be made available to the department [~~Board~~] upon request. These performance/training records forms shall be kept on a format prescribed by the department [~~Board~~] in the business file for at least five (5) [~~two (2)~~] years [~~after termination of employment~~]. The verifiable performance/training records form will be made available to the certified applicator or technician upon written request.

(2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803262
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

DIVISION 6. STRUCTURAL PEST CONTROL ADVISORY COMMITTEE

4 TAC §7.190

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Agriculture (the department) proposes the repeal of Chapter 7, Subchapter H, Division 6, §7.190, concerning regulation of structural pest control. The repeal is proposed to move definitions in this section to Division 1 of this Subchapter, General Provisions, where all other defined terms are located.

Jimmy Bush, Assistant Commissioner for Pesticides, has determined that, for the first five-year period the proposed repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal of §7.190.

Mr. Bush also has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be the elimination of an unnecessary regulation. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. Therefore, no regulatory flexibility analysis is required.

Written comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed repeal in the *Texas Register.*

The repeal of §7.190 is proposed under Occupations Code, §1951.105, which provides the department with the authority to adopt rules for the operation of the Structural Pest Control Advisory Committee.

The code affected by the proposal is Occupations Code, Chapter 1951.

§7.190. Definitions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803263
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-4075

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 9. RULES OF PROCEDURE FOR CONTESTED CASE HEARINGS, APPEALS, AND RULEMAKINGS

SUBCHAPTER A. GENERAL

7 TAC §9.1

The Finance Commission of Texas (commission) proposes amendments to 7 TAC §9.1, concerning Definitions and Interpretation; Severability.

The purpose of the proposed amendments to §9.1 is to make technical corrections. Technical revisions have been made to §9.1 to reflect the name change of the "savings and loan department" to the "department of savings and mortgage lending," as found in Texas Finance Code, §13.0015.

Larry Craddock, administrative law judge for the commission and for the Texas Department of Banking, Office of Consumer Credit Commissioner, and Department of Savings and Mortgage Lending (finance agencies) has determined that for each year of the first five years that the proposed amendments are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the proposed amendments.

Mr. Craddock has also determined that, for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be that the rule will clarify interpretation of Chapter 9 in Title 7 of the Texas Administrative Code. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro-businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments concerning the proposed amendments should be submitted within 31 days of publication to Larry Craddock, Administrative Law Judge, Finance Commission of Texas, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by email to larry.craddock@banking.state.tx.us. To be considered, a

written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The amendments are proposed pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The amendments are also proposed under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.302, 11.306, 66.002, 96.002, 156.102, 201.003.

The statutory provisions affected by the proposed amendments are contained in Finance Code, Chapters 11, 13, 61, 66, 91, 96, 156, 201.

§9.1. Definitions and Interpretation; Severability.

(a) (No change.)

(b) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Administrative law judge--The hearings officer employed by the finance commission to conduct administrative hearings for the finance commission, the department of banking, the department of savings and mortgage lending [~~loan department~~], and the office of consumer credit commissioner.

(2) Agency--The finance commission, the department of banking, the department of savings and mortgage lending [~~loan department~~], or the office of consumer credit commissioner.

(3) Agency head(s)--Finance commission members, the banking commissioner, the savings and mortgage lending [~~loan~~] commissioner, or the consumer credit commissioner, or a designee if authorized by law.

(4) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803212
Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER B. CONTESTED CASE HEARINGS

7 TAC §§9.16, 9.26, 9.29

The Finance Commission of Texas (commission) proposes amendments to 7 TAC §9.16, concerning Pleadings, §9.26, concerning Applicability of Texas Rules of Evidence, and §9.29, concerning Stipulations.

In general, the purpose of the proposed amendments is to codify existing practice and to provide better clarity for litigants in the contested case hearings process. The individual purposes of each section are contained in the following paragraphs.

The purpose of the proposed amendments to §9.16 is to codify the existing practice regarding requirements for pleading and proving affirmative defenses when an application has been denied based on the applicant's criminal history.

The purpose of the proposed amendments to §9.26 is to clarify the existing rule to remove any ambiguity in §9.26(b) in its current form. The proposed amendments reflect that letters of recommendation submitted to a finance agency during the investigation stage will be considered by the agency but will not be admitted into evidence absent the satisfaction of an exception to the hearsay rule or admission without objection.

The purpose of the proposed amendments to §9.29 is to codify the existing practice of allowing oral stipulations on the record at a hearing.

Larry Craddock, administrative law judge for the commission and for the Texas Department of Banking, Office of Consumer Credit Commissioner, and Department of Savings and Mortgage Lending (finance agencies) has determined that for each year of the first five years that the proposed amendments are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the proposed amendments.

Mr. Craddock has also determined that, for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be that the rules will conform to current practice, will be more easily understood by parties to the finance agencies' contested case proceedings, and will help ensure the integrity and stability of the administrative hearing process. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro-businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments concerning the proposed amendments should be submitted within 31 days of publication to Larry Craddock, Administrative Law Judge, Finance Commission of Texas, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by email to larry.craddock@banking.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The amendments are proposed pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The amendments are also proposed under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 181.003, 201.003, 342.551, 351.003 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351.007 (Property Tax Lenders, Acts 2007, 80th Leg., ch. 1220), 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the proposed amendments are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 181, 185, 201, 301, 341, 342, 348, 351 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351 (Property Tax Lenders, known as the "Property Tax Lender License Act," Acts 2007, 80th Leg., ch. 1220), 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

§9.16. Pleadings.

(a) (No change.)

(b) When an application for an original license or renewal license has been denied based on the applicant's criminal history, the applicant shall have the burden of pleading and proving affirmative defenses to establish that the applicant is entitled to the license under Chapter 53 of the Occupations Code (related to the collateral consequences of a criminal conviction) or any mitigating facts related to the applicant's convictions or deferred adjudications.

(c) [~~(b)~~] In addition, a party may file such other pleadings as the party considers appropriate to fully explain and present the party's side of the case. A party who wishes to raise an "affirmative defense" as defined in Texas Rules of Civil Procedure, Rule 94, must notify the agency in writing at least seven days before the hearing unless the administrative law judge allows a shorter notification period pursuant to Texas Rules of Civil Procedure, Rule 63.

(d) [~~(c)~~] If a pleading is so vague or ambiguous that a party is unable to fully understand what is intended to be placed in issue, the party may move for a more definite statement and the administrative law judge shall grant the motion if it is well taken and direct that a more definite statement be made.

§9.26. Applicability of Texas Rules of Evidence.

(a) (No change.)

(b) In cases arising under [~~Texas~~] Occupations Code, Chapter 53 (related to consequences of criminal conviction), letters [~~a letter~~] of recommendation will be considered by a finance agency if submitted [~~to a finance agency~~] during the investigative stage of the licensing proceeding but will not be admitted into evidence at the hearing unless the letter satisfies an exception to the hearsay rule or comes into evidence without objection. A party must arrange to have all character witnesses give testimony in person or, with advance notice to opposing counsel, by phone pursuant to and in accordance with §9.32 of this title (relating to Telephone Hearings) [~~chapter~~].

§9.29. Stipulations.

Parties may by written stipulation, or by oral stipulation on the record, agree upon the facts [~~or any portion thereof~~] and their stipulation may be regarded and used as evidence at the hearing. The administrative law judge in such cases may require any additional evidence necessary to establish the facts to the administrative law judge's satisfaction.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803213
Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

7 TAC §§9.18, 9.23, 9.25

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Finance Commission of Texas or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (commission) proposes the repeal of 7 TAC §9.18, concerning Issuance, Service, and Return of Subpoenas, §9.23, concerning Summary Judgment, and §9.25, concerning The Hearing. The commission has determined that, due to the types of amendments necessary for these rules, the best process to implement changes is the repeal of the current rules and proposal of new rules in the same location on these issues. Therefore, these rules are being proposed for repeal and new rules are proposed elsewhere in this issue of the *Texas Register*.

Larry Craddock, administrative law judge for the commission and for the Texas Department of Banking, Office of Consumer Credit Commissioner, and Department of Savings and Mortgage Lending (finance agencies) has determined that for the first five-year period the repeal as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the repeal.

Mr. Craddock also has determined that for each year of the first five years the repeal as proposed will be in effect, the public benefit anticipated as a result of the repeal will be that the rules will conform to current practice, will be more easily understood by parties to the finance agencies' contested case proceedings, and will help ensure the integrity and stability of the administrative hearing process. There is no anticipated cost to persons who are required to comply with the repeal as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the repeal as proposed.

Comments concerning the proposed repeal should be submitted within 31 days of publication to Larry Craddock, Administrative Law Judge, Finance Commission of Texas, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by email to larry.craddock@banking.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed repeal is published in the *Texas Register*. At the conclusion of the 31st day after the proposed repeal is published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

The repeal is proposed pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The repeal is also proposed under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 181.003, 201.003, 342.551, 351.003 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351.007 (Property Tax Lenders, Acts 2007, 80th Leg., ch. 1220), 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the proposed repeal are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61,

66, 91, 96, 121, 151, 154, 156, 181, 185, 201, 301, 341, 342, 348, 351 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351 (Property Tax Lenders, known as the "Property Tax Lender License Act," Acts 2007, 80th Leg., ch. 1220), 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

§9.18. Issuance, Service, and Return of Subpoenas.

§9.23. Summary Judgment.

§9.25. The Hearing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803216
Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

7 TAC §§9.18, 9.23, 9.25

The Finance Commission of Texas (commission) proposes new 7 TAC §9.18, concerning Issuance of Subpoenas, §9.23, concerning Summary Judgment, and §9.25, concerning The Hearing.

In general, the purpose of the new rules is to codify existing practice and to provide better clarity for litigants in the contested case hearings process. The individual purposes of each section are contained in the following paragraphs.

The purpose of new §9.18 is to conform the issuance of subpoenas to the Administrative Procedure Act (APA). The current rule governing subpoenas tracks the Texas Rules of Civil Procedure, and there is a conflict between those rules and the APA. The APA should govern these proceedings in the event of a conflict between the two sets of rules. Thus, proposed new §9.18 tracks the procedures for issuance of subpoenas provided by the APA.

The purpose of new §9.23 is to provide that certain motions for summary judgment give sufficient notice to opposing parties to allow a valid summary judgment to be issued and to codify existing practice. Subsection (b)(3) of §9.23 and accompanying subparagraphs place the burden of issuing a notice that contains submission deadlines for the opposing party to file affidavits, other written material, and cross-claims or counterclaims, on the moving party. The notice must also contain the time, date and place where the administrative law judge will hear oral argument on the motion. These notice requirements will ensure that summary judgment hearings are set more promptly. The notice requirements will also help ensure that pro se litigants fully understand what the law requires them to do to avoid an unintentional waiver of their rights. Section 9.23(b)(5) allows the administrative law judge to schedule a motion for summary judgment on the same date as a hearing on the merits of the case.

The purpose of new §9.25 is to reorganize the information in current §9.25 and to add new material that reflects existing practice. The new material places the burden of proof on the agency when the agency denies a renewal of an existing license. The new information also places the burden on the applicant to prove the applicant satisfies the requirements for the license under Chapter 53 of the Occupations Code (relating to collateral consequences of a criminal conviction) or to prove any mitigating circumstances surrounding any conviction or deferred adjudications. This new material codifies the administrative law judge's decisions related to these issues.

Larry Craddock, administrative law judge for the commission and for the Texas Department of Banking, Office of Consumer Credit Commissioner, and Department of Savings and Mortgage Lending (finance agencies) has determined that for each year of the first five years that the proposed new rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the rules. Mr. Craddock has also determined that, for each year of the first five years the proposed new rules are in effect, the public benefit anticipated as a result of the rules will be that the rules will conform to current practice, will be more easily understood by parties to the finance agencies' contested case proceedings, and will help ensure the integrity and stability of the administrative hearing process. There is no anticipated cost to persons who are required to comply with the new rules as proposed. There will be no adverse economic effect on small or micro-businesses. There will be no effect on individuals required to comply with the new rules as proposed.

Comments concerning the proposed new rules should be submitted within 31 days of publication to Larry Craddock, Administrative Law Judge, Finance Commission of Texas, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by email to larry.craddock@banking.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The new rules are proposed pursuant to Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The new rules are also proposed under specific rulemaking authority contained in the substantive statutes administered by the finance agencies under the jurisdiction of the commission, including Finance Code, §§11.301, 11.302, 11.304, 11.306, 14.157, 31.003, 66.002, 96.002, 151.102, 154.051, 156.102, 181.003, 201.003, 342.551, 351.003 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351.007 (Property Tax Lenders, Acts 2007, 80th Leg., ch. 1220), 348.513, 371.006, 394.214, and 396.051, Health and Safety Code, §711.012(a) and §712.008, and Tax Code, §32.06.

The statutory provisions affected by the proposed new rules are contained in Finance Code, Chapters 11, 12, 13, 14, 31, 35, 61, 66, 91, 96, 121, 151, 154, 156, 181, 185, 201, 301, 341, 342, 348, 351 (Tax Refund Anticipation Loans, Acts 2007, 80th Leg., ch. 135), 351 (Property Tax Lenders, known as the "Property Tax Lender License Act," Acts 2007, 80th Leg., ch. 1220), 371, 394, 396, Health and Safety Code, Chapters 711 and 712, and Tax Code, §32.06 and §32.065.

§9.18. Issuance of Subpoenas.

On the administrative law judge's own motion or on the written request of a party to a contested case pending before one of the finance commission agencies, the administrative law judge may issue a subpoena

addressed to the sheriff or to a constable to require the attendance of a witness or the production of books, records, papers, or other objects that may be necessary and proper for the purposes of a proceeding if:

(1) good cause is shown; and

(2) for a subpoena requested by a party to a contested case, an amount is deposited that will reasonably ensure payment of the amounts estimated to be due under Government Code, §2001.103.

§9.23. Summary Judgment.

(a) At any time after a notice of hearing is issued, a party may move for a summary judgment on all or any part of a claim or defense.

(b) Except as set out in this section, the finance commission agencies adopt, by reference, the summary judgment procedure in Rule 166a, Texas Rules of Civil Procedure. In addition, the following requirements shall also apply:

(1) The administrative law judge shall hear oral argument on all motions for summary judgment unless the judge expressly waives this requirement.

(2) Before filing the motion, the party moving for summary judgment, in consultation with the administrative law judge's clerk, must schedule the motion for submission on oral argument at least 21 days after the date on which it is filed. If there is an applicable statutory deadline by which the agency must hold a hearing, the submission date must be within the deadline unless it has been waived by both parties.

(3) The party moving for summary judgment must serve on all opposing parties, with a copy of the motion for summary judgment, a notice containing the following information:

(A) the time, date, and place when the administrative law judge will hear oral argument on the motion;

(B) disclosure that any party opposing the motion must file affidavits, other written material, and any cross-claims or counterclaims, with the administrative law judge by the close of business seven days before the date of submission on oral argument;

(C) disclosure that the administrative law judge may take the allegations in the motion as true unless contested by opposing parties through affidavits or other written material; and

(D) disclosure that the administrative law judge will not hear any oral testimony related to the motion.

(4) If one of the agencies files the motion for summary judgment, the agency head or the administrative law judge must sign the notice.

(5) In the administrative law judge's discretion, the judge may set the motion for summary judgment on the same date as an evidentiary hearing scheduled in the cause which is the subject of the motion for summary judgment.

(6) The administrative law judge's proposal for decision recommending summary judgment shall be circulated for exceptions, replies to exceptions, and the filing of briefs before it is sent to the agency heads in compliance with §9.34 of this title (relating to Post-hearing Proceedings).

§9.25. The Hearing.

(a) The administrative law judge has authority analogous to that of a district judge sitting without a jury in a civil case and may make such rulings and issue such orders as may be required to provide a fair, just, expeditious, orderly, and proper hearing. Hearings are open to the public, except that matters made confidential by law must be considered in executive session if requested. If an executive session is not requested before confidential evidence is introduced, the confidentiality of such evidence is considered to have been waived.

(b) At the time and place set for hearing, the administrative law judge shall proceed with the hearing as nearly as may be according to the rules of procedure governing the trial of civil cases in the courts of this state. The party with the burden of proof shall present such party's case, followed by other parties in the sequence assigned by the administrative law judge. Each party shall have the opportunity to present such party's case, by calling and examining witnesses, offering documentary evidence, and making legal arguments. Each party shall have the opportunity to contest the admissibility of evidence and cross-examine opposing witnesses on any matter relevant to the issues even if the matter was not covered in direct examination. A party must make an objection to testimony or an evidentiary offer in a timely manner, stating the basis for the objection, or the objection is waived.

(c) In a case involving an original application for a license, the burden of proof is on the applicant. In cases involving an order to cease and desist, the imposition of penalties, the collection of restitution for violations of law, or an agency's failure to renew an existing license, the burden of proof is on the agency.

(d) A party pleading an "affirmative defense" as defined in Texas Rules of Civil Procedure, Rule 94, has the burden to prove that defense.

(e) The assertion that an applicant for an original or renewal license qualifies for the license under Chapter 53 of the Occupations Code (related to the collateral consequences of a criminal conviction) is an affirmative defense. The applicant for the original or renewal license has the burden to prove the satisfaction of the conditions on which the applicant would be entitled to the license under the Occupations Code. The existence of mitigating circumstances related to a criminal conviction is an affirmative defense. The applicant for an original or renewal license has the burden to prove the existence of such mitigating circumstances.

(f) Unless otherwise provided by statute, the burden of proof shall be by a preponderance of the evidence.

(g) If an applicant for an original license application fails to appear at a scheduled hearing and the agency can prove proper service of notice of the hearing, the administrative law judge may deny the application based on the applicant's failure to carry its burden of proof. If the respondent fails to appear at a hearing in which the agency has the burden of proof, the agency attorney must prove actual or constructive service of a notice of hearing and must present evidence sufficient to prove the agency's case. Failure of the respondent to answer or to appear and contest the agency's case may be considered as some evidence supporting an adverse inference that respondent could not defend or rebut the agency's case.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803215
Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER B. REGULATION OF LICENSES

7 TAC §25.25

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (commission), on behalf of the Department of Banking (department), proposes the repeal of §25.25, concerning conversion from trust to insurance funded benefits. The commission is simultaneously proposing new §25.25 concerning the same subject in this issue of the *Texas Register.* A prior proposed repeal of existing §25.25, as published for comment in the *Texas Register* in the December 28, 2007, issue of the *Texas Register* (32 TexReg 9894), has been withdrawn, as noted elsewhere in this issue of the *Texas Register.*

Finance Code, Chapter 154 (Chapter 154), and rules adopted under Chapter 154, codified in Title 7, Chapter 25 of the Texas Administrative Code, provide an exclusive regulatory framework that allows a person in this state to arrange and pay for a funeral in advance. Chapter 154 imposes a duty upon the department and grants the department the authority to license and regulate sellers of prepaid funeral benefits to ensure that prepaid funeral benefits contracts (prepaid contracts) are performed and funded in accordance with their terms at the time of need.

Existing prepaid contracts for trust-funded prepaid funeral benefits may be converted to insurance-funded prepaid funeral benefits under Finance Code, §154.204, if the department finds that the proposed insurance-funded arrangement safeguards the rights and interests of the individuals who purchased the prepaid contracts to substantially the same degree as the trust-funded arrangement proposed to be replaced. Rule §25.25 was designed to guide an applicant to incorporate certain features that the department considers essential to the finding required by Finance Code, §154.204, and to eliminate other features that detract from the required finding. However, since the original adoption of existing §25.25 in 1996, developments have outpaced its content. Because of the extent of the proposed revisions to §25.25, the commission is proposing a new §25.25, rather than amendments to the existing section. The repeal will not be adopted unless new §25.25 is adopted.

Stephanie Newberg, Deputy Commissioner of the Texas Department of Banking, has determined that, for each of the first five years the proposed repeal is in effect, there will be no fiscal implication for state or local governments. Ms. Newberg has further determined that, for each year of the first five years that the proposed repeal is in effect, the anticipated public benefit will be the deletion of duplicative regulations. The repealed section will be replaced with updated and more specific and understandable regulations that are consistent with the department's current interpretation and application of Finance Code, §154.204, and that will enhance the department's enforcement of, and insurance permit holders' compliance with, the regulatory requirements of Chapter 154. For each year of such first five years, there will be no economic cost to persons required to comply with the proposed repeal. Finally, Ms. Newberg has determined that the proposed repeal will not have an adverse effect upon small businesses or micro-businesses.

To be considered, comments on the proposed repeal must be submitted no later than 5:00 p.m. on August 4, 2008. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

The repeal of existing §25.25 is proposed under Finance Code, §154.204, which provides for department approval of a conversion from trust-funded prepaid funeral benefits to insurance-funded prepaid funeral benefits to safeguard the rights and interests of the individual who purchases a prepaid funeral benefits contract, and under Finance Code, §154.051, which authorizes the commission to adopt rules relating to the enforcement and administration of Chapter 154.

Finance Code, §154.204, is affected by the proposed repeal.

§25.25. Conversion from Trust to Insurance Funded Benefits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803185
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: October 17, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

7 TAC §25.25

The Finance Commission of Texas (commission), on behalf of the Department of Banking (department), re-proposes new §25.25, concerning conversion from trust-funded to insurance-funded benefits under Finance Code, §154.204. The proposed new section is designed to replace existing §25.25, concerning conversion from trust to insurance funded benefits, which the commission is simultaneously proposing for repeal in this issue of the *Texas Register.* A prior proposed §25.25 and the accompanying proposed repeal of existing §25.25, published in the December 28, 2007, issue of the *Texas Register* (32 TexReg 9894, 9895), have been withdrawn, as noted elsewhere in this issue of the *Texas Register.*

Finance Code, Chapter 154 (Chapter 154), and rules adopted under Chapter 154, codified in Title 7, Chapter 25 of the Texas Administrative Code (TAC), provide an exclusive regulatory framework that allows a person in this state to arrange and pay for a funeral in advance. Chapter 154 imposes a duty upon the department and grants the department the authority to license and regulate sellers of prepaid funeral benefits to ensure that prepaid funeral benefits contracts (prepaid contracts) are performed and funded in accordance with their terms at the time of need.

Existing prepaid contracts for trust-funded prepaid funeral benefits may be converted to insurance-funded prepaid funeral benefits under Finance Code, §154.204, if (1) the department

finds that the proposed insurance-funded arrangement safeguards the rights and interests of the individuals who purchased the prepaid contracts (purchasers) to substantially the same degree as the trust-funded arrangement, and (2) each purchaser is notified in writing of the terms of the proposed conversion and the purchaser's right to decline the conversion. Existing §25.25 specifies the required form of an application for conversion and nominally addresses the required notice to purchasers. The rule was designed to guide an applicant to incorporate certain features that the department considers essential to the finding required by Finance Code, §154.204, and to eliminate other features that detract from the required finding. However, since the original adoption of existing §25.25 in 1996, developments have outpaced its content.

Licensed sellers of insurance-funded prepaid funeral benefits are now either insurance companies or affiliates of insurance companies that sell through designated funeral providers acting as agent, both for the seller with respect to the contract, and for the insurance company with respect to the funding insurance policy. Insurance companies that wish to participate in the Texas preneed market will often form a subsidiary to acquire a license under Chapter 154. A number of these affiliate sellers resist accepting responsibility for verifying that funeral services and merchandise are ultimately delivered in accordance with the contract and for maintaining the records the department requires for examination. In addition, a recent failure of an insurance-funded permit holder and its affiliated insurance company has raised concerns about the financial viability and sustainability of insurance-funded permit holders. Selling insurance-funded prepaid funeral benefits involves incurring long-term regulatory commitments in exchange for immediate, front-loaded compensation. Permit holders that lack the resources to fulfill their responsibilities in the later years of a contract's existence are at risk of failure, and may attempt resisting applicable regulatory requirements as a means of survival. This situation is unacceptable.

As a result of these concerns, proposed new §25.25 will require more information regarding the business plan and financial condition of the post-conversion permit holder. The application for conversion must demonstrate that the post-conversion permit holder has or will have access to the financial and other resources necessary to discharge its contractual and statutory obligations as a permit holder, and that the post-conversion permit holder recognizes its future responsibilities to administer its unmatured contracts until finally performed, to verify that each contract is performed and funded in accordance with its terms and Chapter 154, and to maintain the records required under 7 TAC §25.10. Further, the applicant must undertake to again seek licensure and take over administration and management of the converted contracts that remain outstanding if the post-conversion permit holder were to fail despite the required reassurances.

Although the department has attempted to be sensitive to concerns expressed by insurance-funded permit holders regarding regulatory burden and has sought to reduce application requirements to the extent possible, the requirements of proposed new §25.25 continue to reflect the department's longstanding interpretation and application of Finance Code, §154.204. Under that section, the department cannot approve a proposed conversion unless it finds that the proposed insurance-funded arrangement will safeguard the rights and interests of purchasers to substantially the same degree as the trust-funded arrangement sought to be replaced. Among other matters, unless the applicant demonstrates to the satisfaction of the department that the insurance-funded contracts will be performed and funded in compliance with their terms and Chapter 154, and that the permit holder will maintain or have access to the records the department requires to determine such compliance, the department will not be able to make the required finding, and the application for conversion will not be approved.

Proposed §25.25(a) sets forth definitions applicable to §25.25. Proposed §25.25(b) describes the general standards applicable to whether a proposed conversion will safeguard the rights and interests of the purchasers to substantially the same degree as the trust-funded benefits arrangement sought to be replaced, as required by Finance Code, §154.204. While the department will consider any matter relevant to the determination of substantial equivalency, at a minimum, the proposed insurance policy must be a deferred fixed annuity that meets defined parameters, substantially similar to existing §25.25, and the post-conversion permit holder must be the insurance company or an affiliate of the insurance company. The new requirement should not create any regulatory burden on industry because such affiliation already exists, as previously noted.

Proposed §25.25(b) also clarifies that, as a general matter, the post-conversion permit holder must accept responsibility for verifying that converted contracts are appropriately performed and for maintaining required records for examination, and must demonstrate the organizational and financial capability to discharge its accepted responsibilities. As previously discussed, these provisions are proposed to address perceived recalcitrance in the industry and are statutorily based, see Finance Code, §154.053 and §154.103(b).

The required content of an application for conversion is prescribed by proposed §25.25(c) in 20 numbered paragraphs. In large part, these content requirements already exist, either in existing §25.25 or in written policies and checklists developed since §25.25 was last amended. These supplemental policies and checklists are routinely furnished to prospective applicants to provide additional detail regarding determinations of substantial equivalency under Finance Code, §154.204, and the additional information the applicant should submit to support a positive determination. However, additional informational requirements are proposed in response to identified potential risks to the purchaser.

Proposed §25.25(c)(1) requires submission of a letter from the applicant to the commissioner requesting conversion, and describes the required content of the letter. Proposed §25.25(c)(2) requires submission of the agreement among the applicant, the post-conversion permit holder, and the insurance company regarding the transfer, receipt, and application of trust funds upon conversion, with described content requirements. These provisions are generally consistent with current practice as it has developed under existing §25.25, although proposed §25.25(c)(2)(C) includes several new undertakings by the post-conversion permit holder regarding future compliance with Chapter 154 and adopted regulations.

Proposed §25.25(c)(3) requires submission of the estimated total commissions and other compensation to be paid by the insurance company in connection with the conversion to each insurance agent that controls, is controlled by, or is under common control with the applicant or a funeral provider under any of the prepaid contracts to be converted. Current practice requires disclosure of all compensation paid to any party in connection with issuance of the conversion annuities, see existing §25.25(c)(3)(B)(i) and (J). The department believes the disclosure can be appropriately limited to compensation paid to the

original permit holder and/or funeral provider as an inducement to agree to conversion.

Proposed §25.25(c)(4) requires submission of a written agreement between the post-conversion permit holder and the applicant that requires the applicant in the conversion to relinquish the previously maintained, individual prepaid contract ledgers and the post-conversion permit holder to maintain the ledgers after conversion. This requirement is new and is intended to address certain compliance issues that have arisen in recent years.

Proposed §25.25(c)(5) requires the applicant to submit the written agreement between the post-conversion permit holder and each funeral provider designated under any prepaid contract to be converted. Among other matters, the agreement must obligate the funeral provider to provide documentation of funeral performance as requested by the post-conversion permit holder to enable compliance with Chapter 154, and must obligate the parties to protect any nonpublic personal financial or health information of the purchaser and contract beneficiary. These requirements are new and intended to address certain recurring compliance issues that have been previously discussed. In those common circumstances in which the applicant is also the funeral provider, the agreements required by proposed §25.25(c)(4) and (5) can be combined into one.

If the insurance company is not also the proposed post-conversion permit holder, proposed §25.25(c)(6) requires the applicant to submit a written agreement between the post-conversion permit holder and the insurance company that obligates the insurance company to provide documentation regarding the annuities as requested by the post-conversion permit holder to enable compliance with Chapter 154. Further, the agreement must obligate the parties to protect any nonpublic personal financial or health information of the purchaser and contract beneficiary. These requirements are new and intended to address arguments that regulatory compliance cannot be achieved because the parties are prevented by federal law from sharing such information with each other.

If the insurance company is not also the proposed post-conversion permit holder, proposed §25.25(c)(7) requires the insurance company, or its insurance holding company, to commit to the department in writing to take all necessary steps to maintain the existence of the post-conversion permit holder, cause the permit holder to annually renew its permit if renewal is required by Finance Code, §154.107, and provide adequate resources to the post-conversion permit holder to enable it to maintain the financial condition and general fitness necessary to discharge the post-conversion permit holder's responsibilities under Finance Code, Chapter 154, and this chapter. This proposed requirement will not apply if the post-conversion permit holder demonstrates that it independently has the organizational and financial resources to discharge its permit holder responsibilities, and does not intend to rely on the insurance company to provide such resources.

Pursuant to proposed §25.25(c)(8), as part of its application, the applicant must commit to the department in writing to obtain and annually renew a permit under Chapter 154 and assume the post-conversion permit holder's responsibilities with respect to each converted contract that remains outstanding if the post-conversion permit holder or a duly licensed successor fails to renew its permit as required.

Proposed §25.25(c)(9) addresses the form of annuity proposed to be issued as part of the conversion and is substantially similar to existing requirements, see existing §25.25(d)(2).

Proposed §25.25(c)(10) is new and requires a written summary of the pre-conversion, federal income tax status of the purchasers' trusts as qualified funeral trusts under 16 U.S.C. §685 or grantor trusts. The summary must also include a description of the post-conversion manner in which taxable income arising from the annuities will be reported for federal income tax purposes.

Proposed §25.25(c)(11) requires submission of information regarding past performance of annuities previously issued by the insurance company that are similar to the form of annuity to be issued in the proposed conversion. This requirement is new.

Proposed §25.25(c)(12) requires submission of a copy of the form of assignment, if any, to be used in assigning annuity rights or proceeds to the post-conversion permit holder. This provision is substantially similar to current practice, see existing §25.25(c)(3)(K).

Proposed §25.25(c)(13) addresses the qualifications of the post-conversion permit holder by requiring financial statements, similar to existing §25.25(c)(3)(G), as well as information regarding the existing portfolio of prepaid contracts held by the proposed post-conversion permit holder. If any aspect of administering the prepaid contracts to be converted will be outsourced, the contractors that will perform these functions must be disclosed. If any such contractor is affiliated with the post-conversion permit holder, additional information regarding the contracting relationship must be disclosed.

Proposed §25.25(c)(14) addresses the qualifications of the insurance company that will issue the annuities in the proposed conversion, and requires submission of a list of the current financial strength ratings of the insurance company determined by A.M. Best Company, Standard & Poor's, Wiess Research, Duff & Phelps, and Moody's Investors Service, among other matters.

Proposed §25.25(c)(15) requires department approval of the proposed newspaper notice and proposed notification letters to be sent to purchasers. The notification letter from the applicant that advises each purchaser of the terms of the proposed conversion and the purchaser's right to decline the conversion is a key statutory predicate to conversion under Finance Code, §154.204, and therefore must fully and fairly disclose all material information necessary for the purchaser to make an informed decision whether to remain in the trust-funded prepaid funeral benefits arrangement. Accordingly, proposed §25.25(c)(15)(A) and (B) address the content of the notice.

With respect to some aspects of a conversion, the department has no reasonable basis upon which to conclude that the insurance-funded arrangement will safeguard the rights and interests of the purchasers to substantially the same degree as a trust-funded arrangement, due to core statutory differences in the nature of the funding mechanism. In these cases, full and fair disclosure of the differences between insurance funding and trust funding will enable the purchaser to make an informed decision. For example, Finance Code, §154.351, provides that the prepaid funeral guaranty fund was established "to guarantee performance by sellers of prepaid funeral benefits contracts of their obligations to the purchasers under the provisions of this chapter governing prepaid funeral trusts." As implemented by 7 TAC §§25.17 - 25.20, the guaranty fund is tasked to find a successor funeral provider if a trust-funded permit holder is unable

to fulfill its prepaid contracts. In appropriate cases the guaranty fund may pay a funeral provider an additional amount in excess of the trust funds underlying the prepaid contracts in exchange for honoring the contracts as originally written, with no extra charges to the purchasers. This guarantee of contract performance does not apply to insurance-funded contracts and the distinction should be disclosed to the purchaser, as required by proposed §25.25(c)(15)(B)(i).

If the notification letter contains promotional statements or claims that express subjective rather than objective views of the merits or benefits of conversion, proposed §25.25(c)(15)(B)(ii) requires disclosure of the estimated total commissions and other compensation to be paid in connection with the conversion to each identified insurance agent that controls, is controlled by, or is under common control with the applicant or the designated funeral provider under the prepaid contract to be converted. Any compensation from the conversion to be paid to an applicant or funeral provider that is encouraging acceptance of the conversion constitutes information that is material to the purchaser's decision, and must be disclosed.

To the extent the conversion has potential tax implications for the purchaser, full and fair disclosure requires the notification letter to explain the anticipated change in tax treatment. (A disclaimer of tax expertise that urges the purchaser to consult his or her attorney or accountant regarding the described tax issues may also be appropriate.) An example of possible tax implications and required disclosures is included in proposed §25.25(c)(15)(B)(iv), but other tax-related disclosures may be required in specific circumstances.

Proposed §25.25(c)(16) requires submission of a pre-conversion summary of specified contract data, and proposed §25.25(c)(17) requires a pro forma post-conversion summary of similar data assuming the conversion occurs as proposed. These requirements are substantially similar to current requirements, see existing §25.25(c)(3)(C) and (D).

If the applicant will not be selling trust-funded prepaid contracts or administering previously sold trust-funded contracts after the conversion, proposed §25.25(c)(18) requires the applicant to submit a completed form to voluntarily cancel its trust-funded permit, although the cancellation will not be processed unless the conversion is approved and will not be effective until after the department completes the close-out examination of the applicant. This provision matches current practice although not included as a requirement in existing §25.25.

Finally, proposed §25.25(c)(19) requires submission of the conversion application fee required by 7 TAC §25.23, and proposed §25.25(c)(20) is a catch-all provision that requires submission of any other formal or informal agreements or understandings between the parties that relate to the proposed conversion or to future conduct with respect to the converted contracts after conversion.

Proposed §25.25(d) describes how the department will process an application, and articulates the right of the applicant or the post-conversion permit holder to request a hearing if the application is denied or approved with conditions unacceptable to the applicant or the post-conversion permit holder.

Proposed §25.25(e) sets forth the standard conditions that will be imposed by an order approving conversion and not subject to objection. For example, the order approving conversion will require the conversion transaction to be fully implemented and completed on or before the 150th day after the date of the conversion order, and will require certain reports regarding the conversion process to be filed with the department by specific dates. The order will also prohibit issuance of the funding annuities until after the purchasers have the opportunity to decline conversion, unless the issuance can be reversed without harm should the purchaser eventually decline conversion.

Under proposed §25.25(e)(2), the order will require initial notification of purchasers to be made by two means: (i) public notice in a newspaper, and (ii) letter from the applicant to each purchaser by certified mail or another form of mail that requires or provides proof of delivery to the last known address of the purchaser. Further, as described in proposed §25.25(e)(3), a prepaid contract for which the notification letter is returned unclaimed may not be converted until the applicant takes additional steps to locate a new address and resends the notification letter one more time. If a new address is not found, the applicant is required to review the contract in relation to abandoned property laws and report its conclusions to the department before converting the contract.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed section is in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the section.

Ms. Newberg has further determined that, for each year of the first five years that the proposed section is in effect, the new section would benefit the public by consolidating the content requirements of an application for conversion under Finance Code, §154.204, into a single rule. Further, the anticipated public benefit will include the elimination of possible confusion caused by outdated information in the rule. The consumer protection required by Finance Code, §154.204, will be enhanced as a result of the department's evaluation of the expanded and more specific information that will be contained in an application for conversion, the improved notice to purchasers of their options under a conversion, and delivery verification requirements applicable to the notice.

Ms. Newberg has also determined that, for each year of such first five years, there will be additional economic cost to persons required to comply with the proposed new section as compared to the existing rule. The proposed section adds a requirement for public notice by newspaper publication of an approved application, estimated to cost $300 - $1,000 per application, depending on the market in which the notice is published. The proposal also adds a requirement that the notification letter be sent to purchasers by certified mail or another form of mail that requires or provides proof of delivery to the last known address of the purchaser. The additional cost for proof of delivery will vary proportionally with the number of contracts proposed for conversion. Use of traditional certified mail, return receipt requested by mail, would cost approximately $4.90 per contract, although lower-cost and bulk delivery options are available.

Finally, Ms. Newberg has determined that the proposal may have an adverse economic effect upon small businesses and micro-businesses. Government Code, §2006.001(2), defines "small business" with reference to three components: (A) the entity must be for-profit, (B) the entity must be independently owned and operated, and (C) it must have fewer than 100 employees or less than $6 million in annual gross receipts. Each of these three elements must be met in order for an entity to qualify as a small business. Currently, 414 entities are licensed under Chapter 154 to sell prepaid funeral benefits. Of that number,

two are nonprofit and 157 are subsidiaries of other companies and therefore not independently owned and operated. The 255 remaining permit holders are small businesses that may be affected by the rule, because each has less than 100 employees and less than $6 million in annual gross receipts. Of these 255 small businesses, 238 have less than 20 employees and further qualify as micro-businesses.

However, an application to convert a trust-funded prepaid funeral benefits arrangement to an insurance-funded arrangement is an optional action unrelated to licensed activities and license maintenance, and the identified small businesses or micro-businesses will generally not be required to alter their business practices as a result of the rule. While the applicant will typically be an existing trust-funded permit holder and more than likely would qualify as a small business, the costs associated with a conversion application are typically absorbed by the insurance company proposing to issue the funding annuities or by its affiliated post-conversion permit holder, and no insurance company-affiliated permit holder currently qualifies as a small business or micro-business because none are independently owned and operated. Nevertheless, increased costs paid by the insurance company or its affiliated permit holder may be passed on to a small business applicant in the form of reduced compensation for agreeing to the conversion. These possible reductions are inherently the product of negotiations between the parties and cannot be estimated.

Government Code, §2006.002, requires a state agency considering adoption of a rule that would have an adverse economic effect on small businesses or micro-businesses to reduce that effect if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted. The purpose of Finance Code, §154.204, is to protect purchasers holding existing contracts for trust-funded prepaid funeral benefits by imposing two requirements before the trust funded permit holder may convert the existing trust-funded arrangement to an insurance-funded arrangement (absent the affirmative consent of each purchaser). First, Finance Code, §154.204(a), requires the department to approve an application for conversion only if it finds that the proposed insurance-funded arrangement safeguards the rights and interests of the purchasers to substantially the same degree as the trust-funded arrangement proposed to be replaced. Second, Finance Code, §154.204(b), requires that each purchaser be notified in writing of the terms of the proposed conversion and given the opportunity to decline the conversion and remain in the existing trust-funded arrangement. The possible adverse economic effect on small businesses or micro-businesses arises from changes related to the second requirement.

The department is advised that it is not uncommon for about 20% of the mailed conversion notices to be returned to sender or otherwise undeliverable, an unacceptable failure rate with respect to the statutory requirement to notify each purchaser of the right to decline the conversion. The department considered requiring each purchaser to affirmatively acknowledge receipt of the notice of the proposed conversion before that purchaser's contract could be converted. However, this option was determined to impose a disproportionate administrative burden and cost on a trust-funded permit holder compared to other options that provide reasonable assurance that notice has been received by the purchaser. Accordingly, the proposed section requires publication of a newspaper notice as a supplemental means of notifying purchasers and requires proof of delivery of the conversion notice as a means of identifying those purchasers for whom notification requires additional effort. Any cost associated with these additional notification efforts are outweighed by the benefit to purchasers. The now withdrawn proposal for new §25.25, published in the December 28, 2007, issue of the *Texas Register* (32 TexReg 9895), required the notice to be sent by certified mail. As a means of reducing possible adverse economic effect on small businesses or micro-businesses, the current proposal also permits use of another form of mail that provides proof of delivery to the last known address of the purchaser.

The department also considered not adopting changes to the section as a means of reducing possible adverse economic effect on small businesses or micro-businesses, but rejected this approach as not feasible considering the purpose of Finance Code, §154.204(b), that each purchaser be notified in writing of the terms of the proposed conversion and the purchaser's right to decline the conversion.

The department also considered and rejected the idea of exempting small businesses from the additional notification requirements as neither legal nor feasible considering the purpose of Finance Code, §154.204(b). There is no basis under the statute for providing less protection to those who purchase from small businesses.

To be considered, comments on the proposed new section must be submitted no later than 5:00 p.m. on August 4, 2008. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

A public hearing to receive comments on the proposed new rule will be held on Wednesday, July 30, 2008 at 10:00 a.m. at the Brown Heatly Building, 4900 North Lamar Boulevard, Room 1410, Austin, Texas.

New §25.25 is proposed under Finance Code, §154.204, which provides for department approval of a conversion from trust-funded prepaid funeral benefits to insurance-funded prepaid funeral benefits to safeguard the rights and interests of the individual who purchases a prepaid funeral benefits contract, and under Finance Code, §154.051, which authorizes the commission to adopt rules relating to the enforcement and administration of Chapter 154.

Finance Code, §154.204, is affected by the proposed new section.

§25.25. Conversion from Trust-Funded to Insurance-Funded Benefits.

(a) Definitions. Definitions of words and terms in Finance Code, §154.002, are incorporated in this section by reference. The following words and terms have the following meanings when used in this section, unless the context clearly indicates otherwise.

(1) Aggregate trust funds--The trust funds to be transferred with respect to an individual prepaid contract as of the transfer date, comprised of the paid-in principal plus the earnings attributable to that prepaid contract. As the context may require, the term also refers to the sum of the aggregate trust funds for all prepaid contracts subject to conversion.

(2) Applicant--A permit holder under Finance Code, Chapter 154, who files an application under this section.

(3) Contract beneficiary--The person named in a prepaid contract as the intended recipient of contracted funeral merchandise and services.

(4) Conversion--A transaction under Finance Code, §154.204, and this section, to convert all outstanding trust-funded prepaid funeral benefits under existing prepaid contracts administered by the applicant to insurance-funded prepaid funeral benefits to be administered by the post-conversion permit holder after conversion.

(5) Insurance company--The insurance company designated in an application filed under this section to issue the annuities required for the conversion. The insurance company may also be the post-conversion permit holder if permitted under applicable insurance law and regulations.

(6) Paid-in principal--The amount required to be deposited in trust by the applicant with respect to an individual prepaid contract pursuant to Finance Code, §154.253. As the context requires, the term may also refer to the total amount deposited in trust by the applicant for all prepaid contracts.

(7) Post-conversion permit holder--The permit holder designated in an application filed under this section to hold and administer the prepaid contracts after conversion. The post-conversion permit holder may also be the insurance company if permitted under applicable insurance law and regulations.

(8) Prepaid contract--A contract for prepaid funeral benefits under Finance Code, Chapter 154.

(9) Purchaser--An individual who purchased a trust-funded prepaid contract that is the subject of an application filed under this section. The purchaser may also be the contract beneficiary. If permitted by the context, the term includes the purchaser's authorized agent.

(10) TDI--Texas Department of Insurance.

(11) Unpaid principal balance--The unpaid portion of the purchase price of a prepaid contract.

(b) Standards for approval and eligibility. The department will not approve a proposed conversion unless the following general requirements have been met.

(1) Standards for approval. The proposed insurance-funded benefits arrangement must safeguard the rights and interests of the purchasers to substantially the same degree as the trust-funded benefits arrangement sought to be replaced, as provided by Finance Code, §154.204, and this section. An application may be approved or denied without the necessity of a hearing, subject to the right of the applicant or the post-conversion permit holder to request a hearing. Without limiting its ability to consider any matter relevant to the determination of substantial equivalency, the department will not approve a proposed conversion unless:

(A) the form(s) of insurance policy proposed for use in the conversion is a single or flexible premium deferred fixed (not variable) annuity that is structured to protect and preserve the existing rights and interests of the purchaser, including the amount of funds the purchaser would be entitled to receive upon cancellation of the prepaid contract and the amount of funds payable upon maturity of the prepaid contract;

(B) the post-conversion permit holder directly or indirectly controls, is controlled by, or is under common control with the insurance company;

(C) neither the applicant nor the post-conversion permit holder have a record of noncompliance with respect to the requirements of Finance Code, Chapter 154, and this chapter, as evidenced by paragraph (2) of this subsection;

(D) the post-conversion permit holder accepts responsibility for verifying that the prepaid contracts proposed for conversion are performed in accordance with their terms, and undertakes to maintain the records the department requires to determine compliance with Finance Code, Chapter 154, and this chapter; and

(E) the post-conversion permit holder demonstrates the organizational and financial capability to discharge its accepted responsibilities.

(2) Eligibility. At the time the application is filed, processed and approved, the applicant and the post-conversion permit holder must each be in good standing with the department. To be in good standing with the department, the department's most recent report of examination of either permit holder must not cite any violation of applicable laws and regulations or other material deficiencies that have not been remedied or corrected to the satisfaction of the department, and the permit holder must not be delinquent with respect to any fees or filings due to the department. Within 45 days after an application for conversion is filed with the department, the department may conduct an examination of the applicant or the post-conversion permit holder or both before approving or denying the application if an examination has not been conducted within the preceding 12 months or for the purpose of verifying that previously cited violations or other deficiencies have been satisfactorily eliminated or corrected.

(c) Contents of application. An application for conversion must respond to each paragraph of this subsection by number. Overlapping or duplicate responses may be cross-referenced for brevity.

(1) Letter requesting conversion. The applicant shall submit a letter to the commissioner, signed by a duly authorized officer, that:

(A) requests approval of the conversion of the applicant's prepaid contracts;

(B) requests authorization to transfer the applicant's responsibility for the prepaid contracts to the post-conversion permit holder;

(C) summarizes the amount of aggregate trust funds by depository and account number and the component amounts of paid-in principal and earnings, and requests authorization to transfer the aggregate trust funds from the currently approved depository or trustee to the insurance company;

(D) represents that the applicant is in compliance with Finance Code, §154.301, regarding prepaid contracts presumed to be abandoned, and has filed the reports and delivered funds as required by Finance Code, §154.304; and

(E) if the applicant is not an individual, includes a certified resolution of the applicant's board authorizing the conversion, the application, and the execution of related documents by the submitting officer.

(2) Agreement regarding conversion. The applicant must submit an original, signed copy of the agreement among the applicant, the post-conversion permit holder, and the insurance company regarding the transfer, receipt, and application of trust funds upon conversion that, among other matters, contains the following provisions:

(A) agreement of the parties that all prepaid contracts of the applicant in existence as of the date of the application will be subject to conversion, excluding prepaid contracts that are presumed abandoned under Finance Code, §154.301;

(B) agreement of the insurance company that:

(i) the formula for determining the cash surrender value or cancellation benefit of each annuity to be issued in the conversion will be at least as generous to the purchaser as the formula that

would have applied under Finance Code, §154.155, had the prepaid contract not been converted from trust-funded to insurance-funded;

(ii) the face amount of the annuity to be issued with respect to each prepaid contract will not be less than the amount of aggregate trust funds transferred for that prepaid contract;

(iii) for any prepaid contract which is not fully paid and the balance due not included in the annuity described in clause (ii) of this subparagraph, the face amount of the supplemental annuity to be issued may not be less than the unpaid principal balance, and no credit or reduction will be applied to the unpaid principal balance for earnings attributable to paid-in principal under the prepaid contract;

(iv) upon request, a copy of the specifications page of the funding annuity or annuities will be furnished to the purchaser of the prepaid contract to be funded; and

(v) no commissions or other compensation will be paid out of or deducted from the aggregate trust funds to be transferred in the proposed conversion.

(C) agreement of the post-conversion permit holder with respect to the converted prepaid contracts to:

(i) maintain all records required by §25.10 of this title (relating to Recordkeeping Requirements for Insurance-Funded Contracts);

(ii) verify that each death or cancellation benefit claim under a converted prepaid contract is paid in accordance with Finance Code, Chapter 154, and this chapter;

(iii) verify that each prepaid contract is performed by the funeral provider at maturity in accordance with its terms;

(iv) verify that any additional charges imposed by the funeral provider and collected from the decedent's representatives are for additional services or merchandise not otherwise contemplated by and funded under the prepaid contract and, if not, promptly refund or require the funeral provider to refund any prepaid contract overcharges to the decedent's representatives; and

(v) if within the five-year period following approval of the conversion a purchaser presents a fully executed prepaid contract that was not listed in the applicant's pre-conversion or post-conversion summaries and provides proof of payments made on the contract, take action to cause the insurance company to issue one or more annuities with respect to the previously omitted prepaid contract as if it had originally been included in the conversion or, if cancellation is requested by the purchaser, pay or take action to cause the purchaser to be paid the cancellation benefit due, provided that the obligation imposed by this clause is limited to 5.0% of the aggregate trust funds transferred, subject to a minimum total responsibility of $5,000 and a maximum total responsibility of $20,000.

(3) Compensation to insiders. The applicant must submit a written disclosure of the estimated total commissions and other compensation to be paid by the insurance company in connection with the conversion to each insurance agent that controls, is controlled by, or is under common control with the applicant or a funeral provider under any of the prepaid contracts to be converted, expressed as a percentage, dollar amount, or both, and the identity of each such agent.

(4) Agreement of post-conversion permit holder and applicant. The applicant must submit a written agreement between the post-conversion permit holder and the applicant that, at a minimum, requires the applicant to relinquish the individual prepaid contract ledgers formerly maintained by the applicant under §25.11 of this title (relating to Record Keeping Requirements for Trust-Funded Contracts) and obligates the post-conversion permit holder to maintain such ledgers to reflect the paid-in principal and the unpaid principal balance under each converted prepaid contract.

(5) Agreements between post-conversion permit holder and funeral providers. The applicant must submit the written agreement between the post-conversion permit holder and each person designated as the funeral provider under any prepaid contract to be converted that, at a minimum:

(A) sets forth the nature and scope of the relationship between the permit holder and the funeral provider and the respective rights and responsibilities of the parties with respect to the prepaid contracts of that funeral provider, including allocation of responsibilities for refunding any prepaid contract overcharges identified by the permit holder or the department;

(B) requires the funeral provider to perform and deliver the funeral benefits under each converted prepaid contract of that funeral provider in accordance with its terms;

(C) requires the funeral provider to provide the post-conversion permit holder with the documentation necessary to enable the permit holder to maintain the records required by Finance Code, Chapter 154, and §25.10 of this title; and

(D) obligates the parties to protect any nonpublic personal financial or health information of the purchaser and contract beneficiary under the prepaid contract in compliance with applicable law.

(6) Agreement of post-conversion permit holder and insurance company. If the proposed post-conversion permit holder is not the insurance company, the applicant must submit a written agreement between the post-conversion permit holder and the insurance company that, at a minimum, requires the insurance company to provide the post-conversion permit holder with the documentation necessary to enable the permit holder to maintain the records required by §25.10 of this title. The agreement must also obligate the parties to protect any nonpublic personal financial or health information of the purchaser and contract beneficiary under each converted prepaid contract and the owner and insured under each annuity issued in the proposed conversion in compliance with applicable law.

(7) Commitment of insurance company. If the post-conversion permit holder is not the insurance company and is unable to independently demonstrate that it has the organizational and financial resources to discharge its permit holder responsibilities, or otherwise intends to rely on the insurance company to provide such resources, the insurance company or its insurance holding company must commit to the department in writing to take all necessary steps to maintain the existence of the post-conversion permit holder, cause the permit holder to annually renew its permit if renewal is required by Finance Code, §154.107, and provide adequate resources to the post-conversion permit holder to enable it to maintain the financial condition and general fitness necessary to discharge the post-conversion permit holder's responsibilities under Finance Code, Chapter 154, and this chapter.

(8) Commitment of applicant. The applicant must commit to the department in writing to obtain and annually renew a permit under Chapter 154 and assume the post-conversion permit holder's responsibilities with respect to each converted contract for any year in which any converted contract remains outstanding and the post-conversion permit holder or a duly licensed successor fails to renew its permit as required with respect to the converted contracts, as evidenced by a final order revoking the permit. The commitment must obligate the applicant to submit its completed application with all required fees not later than the 31st day after the date the department notifies the applicant in writing of the facts that require licensure under the commitment.

(9) Form of annuity. The applicant must submit a copy of the form(s) of annuity proposed to be issued as part of the conversion. The submitted form(s) must be accompanied by a copy of the TDI notice of action approval letter. The applicant and not TDI is responsible for ensuring that the form of annuity complies with this section. Among other matters, the annuity must:

(A) provide guaranteed growth of the death benefit of no less than 2.0% compounded annually on gross premiums paid beginning in the first year of the policy;

(B) provide a formula for determining cash surrender value or cancellation benefit that will be at least as generous to the purchaser as the formula that would have applied under Finance Code, §154.155, had the prepaid contract not been converted from trust-funded to insurance-funded;

(C) provide a death benefit for the duration of the prepaid contract that equals the sum of the aggregate trust funds transferred at conversion, all future premiums paid, and accumulated growth thereon as provided by subparagraph (A) of this paragraph, provided that the death benefit can never be less than the amount that would have been available under the prepaid contract on the date of conversion had the prepaid contract not been converted from trust-funded to insurance-funded; and

(D) not include any provision that allows for contesting coverage or limiting death benefits, refers to or requires a physical examination, or otherwise operates as an exclusion, limitation, or condition on payment of death benefits other than provisions requiring submission of proof of death or surrender of the annuity at the time the annuity matures or is canceled.

(10) Federal income tax treatment. The applicant must submit a written summary describing the pre-conversion, federal income tax status of the purchasers' trusts, in the aggregate, as either qualified funeral trusts under 16 U.S.C. §685 or grantor trusts, for the preceding taxable year. Disclosure of differing treatment of individual purchaser trusts is not required if the summary identifies and quantifies the percentage of purchaser trusts treated as grantor trusts and qualified funeral trusts. The applicant must also describe the post-conversion manner in which taxable income arising from the annuities will be reported for federal income tax purposes, including taxable income arising from payment of cash surrender value.

(11) Past performance. The applicant must submit an historical yield table or graph reflecting the annual rate of growth in the death benefit under previously issued annuities similar to the form of annuity proposed to be issued by the insurance company in the proposed conversion, expressed as a percentage for each year of the most recent five-year period, to the extent such annuities were in existence in those periods. For purposes of this paragraph, the annual growth under the annuity equals the growth rate credited by the insurance company to the death benefit for the year.

(12) Form of assignment. The applicant must submit a copy of the form of assignment, if any, to be used in assigning annuity rights or proceeds to the post-conversion permit holder.

(13) Qualifications of post-conversion permit holder. With respect to the post-conversion permit holder, the applicant must submit:

(A) if the proposed post-conversion permit holder is not also the insurance company, a copy of the post-conversion permit holder's most recent annual financial statements and the most current year-to-date financial statements;

(B) a list of all previous conversions in this state accepted by the post-conversion permit holder and, with respect to each conversion, the date of the order approving the conversion and the date that the converted prepaid contracts were formally transferred to the post-conversion permit holder;

(C) a summary of the number and aggregate purchase price of all prepaid contracts administered by the post-conversion permit holder as of the end of the immediately preceding calendar year;

(D) a description of how the prepaid contracts to be converted will be administered by the post-conversion permit holder, including a description of activities or functions, other than delivery of funeral services and merchandise by the designated funeral provider, that will be outsourced and the contractor that will perform such activities or functions; and

(E) if any contractor named in response to subparagraph (D) of this paragraph directly or indirectly controls, is controlled by, or is under common control with the post-conversion permit holder, a summary of the contracting relationship for each of the preceding three fiscal years that includes a description of the services performed and the compensation paid by the post-conversion permit holder.

(14) Qualifications of insurance company. With respect to the insurance company, the applicant must submit:

(A) a letter from the insurance company addressed to the department, dated not more than 60 days prior to the date the application is filed, representing that the insurance company is in good standing and currently authorized to conduct the business of insurance in this state;

(B) to the extent available, a list of the current financial strength ratings of the insurance company determined by A.M. Best Company, Standard & Poor's, Wiess Research, Duff & Phelps, and Moody's Investors Service; and

(C) a list of all previous conversions in this state that were funded by the insurance company and, with respect to each conversion, the date of the order approving the conversion and the date that trust funds were formally transferred to the insurance company.

(15) Notice to purchasers. The applicant must submit the proposed form of public notice required by subsection (e)(2) of this section and each proposed notification letter to be sent to purchasers from the applicant, the post-conversion permit holder, or the insurance company for approval by the department.

(A) The proposed form of notification letter from the applicant must:

(i) provide full and fair disclosure of all material information necessary to enable the purchaser to understand the terms of the proposed conversion and the impact on the purchaser and the purchaser's contract;

(ii) notify the purchaser of the purchaser's right under Finance Code, §154.204(b), to decline the conversion and remain in the existing trust-funded funeral benefit arrangement by filing a written request with the department within 60 days;

(iii) include a form that the purchaser can fill out and submit to the department to decline the conversion;

(iv) inform the purchaser that a copy of the specifications page of the funding annuity is available upon request; and

(v) advise the purchaser that questions or complaints regarding the prepaid contract or the proposed conversion may be directed to the Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705; 1-877-276-5554 (toll free); or www.banking.state.tx.us.

(B) Without limiting the requirement to fully and fairly disclose all material information in the notification letter, with respect to the specific issues or in the specifically described circumstances below, the notification letter must:

(i) disclose that the prepaid funeral guaranty fund will no longer guarantee performance of the prepaid contract after conversion and, if the designated funeral provider ceases doing business for any reason after conversion but before performance of the contract, the purchaser may be responsible for contracting with another funeral provider and arranging for life insurance proceeds to be paid to the new funeral provider, who may not be obligated to provide the previously selected funeral services and merchandise for the same price specified in the contract;

(ii) if the notification letter contains promotional statements or claims that express subjective rather than objective views of the merits or benefits of conversion, disclose the estimated total commissions and other compensation to be paid by the insurance company in connection with the conversion to each insurance agent, identified by name, that controls, is controlled by, or is under common control with the applicant or the funeral provider under the prepaid contract to be converted, expressed as a dollar amount;

(iii) if the prepaid contract allows the contract beneficiary to be changed, disclose that the contract beneficiary may no longer be changed after the funding annuity is issued; and

(iv) disclose that the trustee or applicant, as the case may be, will no longer be liable for or otherwise assume payment of federal income taxes on taxable income from the trust, and describe the manner in which and to whom taxable income arising from the annuities will be reported:

(I) if, with regard to the preceding taxable year, the pre-conversion trustee elected to treat the prepaid contract as a qualified funeral trust under 16 U.S.C. §685, or if the applicant voluntarily assumed and paid any tax liability attributable to taxable income from the trust that would otherwise have been reported to the purchaser; and

(II) if taxable income arising from the annuities upon death or cancellation will be reported to the purchaser, contract beneficiary, or contract beneficiary's estate for federal income tax purposes.

(16) Pre-conversion summary. The applicant must submit a pre-conversion summary pertaining to each prepaid contract to be converted, determined as of a date no earlier than 30 days prior to the date the application is filed, with totals for all prepaid contracts to be converted, if applicable, addressing each of the following categories:

(A) name and, if available, date of birth of the purchaser;

(B) date of contract;

(C) contract purchase price;

(D) paid-in principal;

(E) unpaid principal balance, if any;

(F) accumulated earnings;

(G) cancellation benefit due to the purchaser, assuming cancellation were to occur on the calculation date;

(H) amount eligible to be withdrawn from the trust fund by the applicant upon death of the contract beneficiary, assuming death were to occur on the calculation date; and

(I) amount retained by the applicant under Finance Code, §154.252.

(17) Pro forma post-conversion summary. The applicant must submit a pro forma post-conversion summary pertaining to each prepaid contract as if converted, determined as of the same date as the pre-conversion summary, with totals for all prepaid contracts, if applicable, addressing each of the following categories:

(A) name of annuitant;

(B) contract purchase price;

(C) paid-in principal;

(D) unpaid principal balance, if any;

(E) the amount of transferred trust funds applied to the premium for the annuity;

(F) amount retained by the applicant under Finance Code, §154.252;

(G) cash surrender value of each annuity, assuming the annuity were to be surrendered on the calculation date; and

(H) death benefit under each annuity, assuming death were to occur on the calculation date.

(18) Voluntary cancellation of permit. If the applicant will not sell trust-funded prepaid contracts or administer previously sold trust-funded prepaid contracts after the conversion, the applicant must submit a completed form to voluntarily cancel its trust-funded permit. The applicant's voluntary cancellation will not be processed unless the conversion is approved, and will not be effective until the department completes the close-out examination of the applicant.

(19) Application fee. In connection with an application submitted under this section, the applicant must submit the conversion application fee required by §25.23 of this title (relating to Application Fees).

(20) Side agreements. To the extent not otherwise required by this subsection, the applicant must submit copies of any other agreements between or among the applicant, a funeral provider, the post-conversion permit holder, and/or the insurance company that contain contractual provisions or informal understandings or undertakings addressing any aspect of the proposed conversion or the future relationship among the applicant, a funeral provider, the post-conversion permit holder, and/or the insurance company with respect to any converted prepaid contract.

(d) Consideration of application; hearing. If the application is deficient, the department may require any person connected with the proposed conversion to submit additional information. An application may be approved or denied without the necessity of a hearing, subject to the right of the applicant or the post-conversion permit holder to request a hearing.

(1) Conditions in order approving conversion. An order approving conversion will impose certain conditions that are not subject to objection, as described in subsection (e) of this section. The order may also impose other, nonstandard conditions specific to the conversion at issue. The applicant or the post-conversion permit holder must submit a written request for hearing pursuant to paragraph (2) of this subsection if any nonstandard condition in the order is objectionable, in which case the order is deemed to be a denial. Consummation of the conversion transaction constitutes confirmation of acceptance by the applicant, the post-conversion permit holder, and the insurance company of any conditions imposed by the order and is considered for all purposes an agreement with the department enforceable against the

applicant, the post-conversion permit holder, and the insurance company.

(2) Hearing. The applicant or the post-conversion permit holder may file a written request for hearing with the commissioner on or before the 30th day after the date of the order denying the application, or an order imposing nonstandard conditions objectionable to the applicant or the post-conversion permit holder, stating with specificity the reasons the applicant alleges that the decision of the department is in error. The request for hearing will be forwarded to the administrative law judge who must enter appropriate orders and conduct the hearing on or before the 60th day after the date the request for hearing was received, or as soon as is otherwise reasonably possible, under Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings) and Government Code, Chapter 2001. The applicant or the post-conversion permit holder has the burden of proof to demonstrate that the proposed insurance-funded prepaid funeral benefits safeguards the rights and interests of each affected purchaser to substantially the same degree as the existing trust-funded prepaid funeral benefits sought to be replaced. A denial of an application may not be appealed until a final order is issued.

(e) Standard conditions in order approving conversion. An order approving conversion will impose six required conditions that are not subject to objection. Failure to satisfy any of these conditions constitutes a violation of an order of the commissioner subject to possible enforcement action under Finance Code, Chapter 154.

(1) The order approving conversion will prohibit issuance of the annuities prior to the expiration of the time period for a purchaser to decline conversion, including any extended time period required by paragraph (4) of this subsection, except that the annuities may be issued prior to that date if expiration of the time period will occur during the free look period or if a purchaser electing to decline conversion will not be required to pay an early withdrawal penalty for cancellation of the annuity.

(2) Pursuant to Finance Code, §154.204(b), the order approving conversion will require the applicant to notify purchasers of the proposed conversion by the following means:

(A) The notification letter from the applicant described by subsection (c)(15) of this section must be sent to purchasers by certified mail or another form of mail that requires or provides proof of delivery to the last known address of the purchaser.

(B) The applicant must publish a one-time public notice in a newspaper of general circulation in the county in which the applicant is located, or in another publication or location as directed by the department, as evidenced by a publisher's affidavit attesting to the date of publication, advising purchasers of trust-funded prepaid contracts from applicant of the pending conversion, the right of a purchaser to decline conversion, and the manner in which a purchaser may obtain more information about the purchaser's rights and options regarding the conversion.

(3) The order approving conversion will provide that a prepaid contract for which the notification letter is returned unclaimed may not be converted to the insurance-funded funeral benefit arrangement approved in the order unless the requirements of this paragraph are met.

(A) With respect to each notification letter returned unclaimed because the address is incorrect, the addressee is unknown or has moved without leaving a forwarding address, or the addressee's forwarding order has expired, the applicant must search for a new address for the purchaser using available non-fee based resources. If a new address is located, the applicant must resend the notification letter one time in the manner required by subsection (e)(2)(A) of this section.

(B) With respect to each unclaimed notification letter for which a new address is not located and with respect to each remailed notification letter that is returned unclaimed, the applicant must review the related contract file in light of the returned letter to verify or change its prior determination that the contract should not be presumed abandoned under Finance Code, §154.301, and must retain documentation evidencing its review for examination by the department. A prepaid contract subject to this paragraph may be converted to the insurance-funded funeral benefit arrangement approved in the order only if the applicant makes a new affirmative finding that the contract should not be presumed abandoned. On or before the 120th day after the date of the order, the applicant must submit a report to the department summarizing its activities under this subparagraph and reporting the basis for findings made.

(4) The order approving conversion will require the post-conversion permit holder, on or before the 120th day after the date of the order, to submit to the department a notarized statement attesting that the annuities have been issued and funded on behalf of the purchasers listed in the pro forma post-conversion summary included in the conversion application and disclosing the date that the notification letters included in the conversion application were mailed to the purchasers.

(5) The order approving conversion will require the post-conversion permit holder, on or before the 120th day after the date the trust funds are transferred as authorized by the order, to submit to the department a final post-conversion summary pertaining to each converted prepaid contract, determined as of the conversion date, with totals for all prepaid contracts, if applicable, addressing each of the following categories:

(A) name of annuitant;

(B) policy number of the annuity issued to the annuitant, or of each annuity if a supplemental annuity is also issued;

(C) contract purchase price;

(D) paid-in principal;

(E) unpaid principal balance, if any;

(F) the amount of transferred trust funds applied to the premium for each annuity;

(G) amount retained by the applicant under Finance Code, §154.252;

(H) cash surrender value of each annuity, assuming the annuity were to be surrendered on the conversion date; and

(I) death benefit under each annuity, assuming death were to occur on the conversion date.

(6) The order approving conversion will require the conversion transaction to be fully implemented and completed on or before the 150th day after the date of the conversion order.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803184
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: October 17, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER B. INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §§84.201 - 84.203

The Finance Commission of Texas (commission) proposes new §§84.201 - 84.203, concerning Retail Installment Contracts, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner.

The new rules contain new operational provisions regarding the calculation and collection of charges. The purpose of the new operational rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. The following paragraphs outline the individual purposes of each proposed rule.

Section 84.201 explains the methods and procedures for calculating time price differential in connection with a motor vehicle retail installment sales contract.

Section 84.202 outlines the procedures for assessing and collecting a default charge in connection with a motor vehicle retail installment sales contract.

Section 84.203 explains the methods and procedures for calculating and collecting a deferment charge in connection with a motor vehicle retail installment sales contract.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn has determined that for each year of the first five years the new operational rules are in effect the public benefit anticipated will be that the commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced.

Effective September 1, 2002, Texas Finance Code, Chapter 348 has required motor vehicle sales finance dealers to be licensed by the Office of Consumer Credit Commissioner. The agency also conducts examinations to ensure compliance with Chapter 348. The proposed new rules provide guidance and clarification for the examination process used to establish that compliance.

There is no anticipated cost to persons who are required to comply with the rules as proposed. There will be no effect on individuals required to comply with the rules as proposed. There is no anticipated adverse economic effect on small or micro-businesses.

Comments on the proposed new rules may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed rules are published in the *Texas Register*. At the conclusion of the 31st day after the proposed rules are published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

The new sections are proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The rules affect Texas Finance Code, Chapter 348.

§84.201. Time Price Differential.

(a) Precomputed retail installment sales contracts. A retail installment sales contract may not contain a time price differential charge that exceeds the add-on rates authorized by Texas Finance Code, §348.104 or the alternative simple time price differential rate authorized by Texas Finance Code, §348.105 as calculated by the add-on method or scheduled installment earnings method. Prepaid time price differential in the form of points is not permitted.

(b) Time price differential-bearing retail installment sales contracts. A retail installment sales contract may not contain a time price differential charge that exceeds the maximum annualized daily rate authorized by Texas Finance Code, §348.104 or the alternative simple time price differential rate authorized by Texas Finance Code, §348.105 as calculated by the true daily earnings method. Prepaid time price differential in the form of points is not permitted.

(c) Minimum time price differential. In lieu of the time price differential charge specified under subsections (a) and (b) of this section, a retail seller may charge a minimum time price differential charge of $25.

(d) Method of calculation.

(1) Regular payment contract using sum of the periodic balances method. The time price differential charge is computed using the add-on rates authorized by Texas Finance Code, §348.104 or the alternative time price differential rate authorized by Texas Finance Code, §348.105 converted to an equivalent add-on rate per $100 per annum.

(A) Base time price differential charge. The base time price differential charge is determined by multiplying the principal balance subject to a finance charge, as defined by §84.102(11) of this title (relating to Definitions), by the applicable add-on rate per $100 per year for the corresponding term of the contract. If the retail installment contract is payable for a period that is shorter or longer than a year or is for an amount that is less or greater than $100, the amount of the time price differential charge is decreased or increased proportionately.

(B) Add-on rates. The applicable add-on rate per $100 per year is determined by the model year designated by the manufacturer of the vehicle.

(C) Deferred sales tax. For usury purposes, the deferred sales tax is allocated on a straight line basis. A straight line basis is calculated by dividing the original gross deferred sales tax amount by the original term of the contract. The allocation of the deferred sales tax for the final payment must be adjusted for any rounding differences. The payment amount disclosed on the retail installment sales contract must include the straight line allocation of the deferred sales tax per installment.

(D) Conversion of the alternative time price differential rate to an add-on rate per $100 per annum. The maximum add-on rate per $100 per annum cannot exceed the add-on rate contained in Figure:

7 TAC §84.201(d)(1)(D). The add-on rate per $100 per annum is determined by converting the current maximum alternative rate authorized by Texas Finance Code, §348.105 to an equivalent add-on rate for the given monthly term of the contract. The simple alternative time price differential rate used in Figure: 7 TAC §84.201(d)(1)(D) is 18% per annum. If the alternative simple time price differential rate is adjusted according to Texas Finance Code, Chapter 303 and is greater than 18% per annum, the add-on rates shown in Figure: 7 TAC §84.201(d)(1)(D) should be adjusted accordingly.
Figure: 7 TAC §84.201(d)(1)(D)

(2) Scheduled installment earnings method. The scheduled installment earnings method can be used for both regular and irregular payment contracts.

(A) Maximum time price differential. The maximum time price differential charge is computed by applying the applicable maximum daily rate to the unpaid principal balance subject to a finance charge, as defined by §84.102(11) of this title, as if each payment will be made on its scheduled installment date. A payment received before or after the due date does not affect the amount of the scheduled reduction in the unpaid principal subject to a finance charge. The computation of the time price differential must comply with the U.S. Rule as defined by §84.102(19) of this title.

(B) Maximum annualized daily rate.

(i) Sales tax advanced transactions. On sales tax advanced transactions using the scheduled installment earnings method, the annualized daily rate is either:

(I) the annual percentage rate disclosed on the retail installment sales contract; or

(II) the contract rate if the retail seller requires the retail buyer to purchase credit life or credit accident and health insurance.

(ii) Sales tax deferred transactions. On sales tax deferred transactions using the scheduled installment earnings method, the annualized daily rate is the contract rate.

(iii) Effective rate. The maximum annualized daily rate cannot exceed the effective rate contained in Figure: 7 TAC §84.201(d)(2)(B)(iii) for the equivalent monthly period and appropriate add-on rate per $100 determined by the model year designated by the manufacturer of the vehicle. The effective rates contained in Figure: 7 TAC §84.201(d)(2)(B)(iii) are the current maximum annualized daily rate authorized by Texas Finance Code, §348.104 or the alternative simple time price differential rate authorized by Texas Finance Code, §348.105. The alternative simple time price differential rate authorized by Texas Finance Code, §348.105 is 18% per annum. If the alternative simple time price differential rate is adjusted according to Texas Finance Code, Chapter 303 and is greater than effective rate contained in Figure: 7 TAC §84.201(d)(2)(B)(iii), the published rate will be highest effective rate.
Figure: 7 TAC §84.201(d)(2)(B)(iii)

(iv) Irregular payment contract effective rate. On a retail installment sales contract that is an irregular payment contract, the highest effective rate is determined by taking the closest monthly effective rate as shown in Figure: 7 TAC §84.201(d)(2)(B)(iii) assuming that the contract was payable in substantially equal successive monthly installments beginning one month from the date of the contract.

(I) The closest monthly period is determined as follows:

(-a-) Count the number of days from the date of the contract to the originally scheduled maturity date;

(-b-) Divide the results of item (-a-) of this subclause by 365;

(-c-) Multiply the results of item (-b-) of this subclause by 12.

(II) If the results of subclause (I) of this clause are exactly halfway or more between the two monthly periods, the closest monthly period is rounded up to the next monthly period. For example, if the closest monthly period is determined to be 14.50 months, the maximum annualized daily rate is the effective rate for 15 months.

(III) If the results of subclause (I) of this clause are less than halfway between the two monthly periods, the closest monthly period is rounded down to the previous monthly period. For example, if the closest monthly period is determined to be 14.49 months, the maximum annualized daily rate is the effective rate for 14 months.

(C) Deferred sales tax. For usury purposes, the deferred sales tax is allocated on a straight line basis. A straight line basis is calculated by dividing the original gross deferred sales tax amount by the original term of the contract. The allocation of the deferred sales tax for the final payment must be adjusted for any rounding differences. The payment amount disclosed on the retail installment sales contract must include the straight line allocation of the deferred sales tax per installment.

(D) Contract rate less than the maximum annualized daily rate. If a retail seller consummates a retail installment sales contract with a contract rate that is less than the maximum annualized daily rate, the retail seller must compute the time price differential charge at the disclosed contract rate.

(3) True daily earnings method. The true daily earnings method can be used for both regular and irregular payment contracts.

(A) Maximum time price differential. The maximum time price differential charge is computed by applying the applicable daily rate to the unpaid principal balance subject to a finance charge, as defined by §84.102(11) of this title. The computation of the time price differential must comply with the U.S. Rule as defined by §84.102(19) of this title. The earned time price differential charge is computed as follows:

(i) multiply the unpaid principal balance subject to a finance charge by the applicable daily rate; and

(ii) multiply the results of clause (i) of this subparagraph by the number of days the actual unpaid principal balance subject to a finance charge is outstanding.

(B) Maximum annualized daily rate.

(i) Sales tax advanced transactions. On sales tax advanced transactions using the true daily installment earnings method, the annualized daily rate is either:

(I) the annual percentage rate disclosed on the retail installment sales contract; or

(II) the contract rate if the retail seller requires the retail buyer to purchase credit life or credit accident and health insurance.

(ii) Sales tax deferred transactions. On sales tax deferred transactions using the true daily installment earnings method, the annualized daily rate is the contract rate.

(iii) Effective rate. The maximum annualized daily rate cannot exceed the effective rate contained in Figure: 7 TAC §84.201(d)(2)(B)(iii) for the equivalent monthly period and appro-

priate add-on rate per $100 determined by the model year designated by the manufacturer of the vehicle. The effective rates contained in Figure: 7 TAC §84.201(d)(2)(B)(iii) are the current maximum annualized daily rate authorized by Texas Finance Code, §348.104 or the alternative simple time price differential rate authorized by Texas Finance Code, §348.105. The alternative simple time price differential rate authorized by Texas Finance Code, §348.105 is 18% per annum. If the alternative simple time price differential rate is adjusted according to Texas Finance Code, Chapter 303 and is greater than effective rate contained in Figure: 7 TAC §84.201(d)(2)(B)(iii), the published rate will be highest effective rate.

(iv) Irregular payment contract effective rate. On a retail installment sales contract that is an irregular payment contract, the highest effective rate is determined by taking the closest monthly effective rate as shown in Figure: 7 TAC §84.201(d)(2)(B)(iii) assuming that the contract was payable in substantially equal successive monthly installments beginning one month from the date of the contract.

(I) The closest monthly period is determined as follows:

(-a-) Count the number of days from the date of the contract to the originally scheduled maturity date;

(-b-) Divide the results of item (-a-) of this subclause by 365;

(-c-) Multiply the results of item (-b-) of this subclause by 12.

(II) If the results of subclause (I) of this clause are exactly halfway or more between the two monthly periods, the closest monthly period is rounded up to the next monthly period. For example, if the closest monthly period is determined to be 14.50 months, the maximum annualized daily rate is the effective rate for 15 months.

(III) If the results of subclause (I) of this clause are less than halfway between the two monthly periods, the closest monthly period is rounded down to the previous monthly period. For example, if the closest monthly period is determined to be 14.49 months, the maximum annualized daily rate is the effective rate for 14 months.

(C) Deferred sales tax. For usury purposes, the deferred sales tax is allocated on a straight line basis. A straight line basis is calculated by dividing the original gross deferred sales tax amount by the original term of the contract. The allocation of the deferred sales tax for the final payment must be adjusted for any rounding differences. The payment amount disclosed on the retail installment sales contract must include the straight line allocation of the deferred sales tax per installment.

(D) Contract rate less than the maximum annualized daily rate. If a retail seller consummates a retail installment sales contract with a contract rate that is less than the maximum annualized daily rate, the retail seller must compute the time price differential charge at the disclosed contract rate.

(E) Allocation of payment. If the retail installment sales contract does not prescribe the method for the application of the payment, the payment should be applied in the following order:

(i) amount of the straight line allocation of the deferred sales tax, if the transaction is a sales tax deferred transaction;

(ii) default charges or deferment charges;

(iii) earned but unpaid time price differential charge; and

(iv) anything else owed under the contract.

§84.202. Default Charge.

(a) Definition. A default charge is the additional charge for a late payment on a contract. The term default charge is synonymous with the term delinquency charge as contained in Texas Finance Code, §348.107.

(b) Precomputed regular payment contract using sum of the periodic balances method. For a regular payment contract employing the add-on method and the refunding method of the sum of the periodic balances, a holder may assess, charge, and collect a default charge not to exceed 5% of the scheduled payment or a default charge on the past due amount computed at the maximum daily rate authorized for the contract from the due date to the date that the past due amount is paid.

(c) Scheduled installment earnings method. For a regular or an irregular payment contract employing the scheduled installment earnings method, a holder may assess, charge, and collect a default charge not to exceed 5% of the scheduled payment and a default charge on the past due amount computed at the maximum daily rate authorized for the contract from the due date to the date that the past due amount is paid.

(d) True daily earnings method. For a regular payment contract or an irregular payment contract employing the true daily earnings method, a holder may assess, charge, and collect a default charge not to exceed 5% of the scheduled payment and a default charge on the past due amount computed at the maximum daily rate authorized for the contract from the due date to the date that the past due amount is paid. The default charge authorized under this subsection is in addition to the contractual time price differential charge earned on the principal balance subject to a finance charge.

(e) Contract required. No default charge may be assessed, imposed, charged, or collected unless contracted for in writing by the parties.

(f) Default period.

(1) Ordinary vehicles and non-heavy commercial vehicles. A default charge may not be assessed until the 15th day after the installment due date. For example, if the installment due date is the 1st of the month, a default charge may not be assessed until the 17th of the month.

(2) Heavy commercial vehicles. A default charge may not be assessed until the 10th day after the installment due date. For example, if the installment due date is the 1st of the month, a default charge may not be assessed until the 12th of the month.

(g) Pyramiding prohibited. An authorized lender seeking to assess additional interest for default on a retail installment sales contract under Texas Finance Code, Chapter 348 must comply with the prohibition on the pyramiding of late charges set forth in the Federal Trade Commission Credit Practices Rule at 16 C.F.R. §444.4.

(h) Default charge on final installment balloon payment. If the retail buyer elects to pay the final balloon payment instead of refinancing the balloon payment as permitted by Texas Finance Code, §348.123, a default charge is allowed on the balloon payment.

(i) Default charge on deferred downpayment. A default charge under Texas Finance Code, §348.107 is not allowed on a deferred downpayment.

§84.203. Deferment Charge.

(a) Definition. A "deferment" means the payment of an additional charge to defer the payment date of a scheduled payment or partial payment on a contract. A deferment charge prescribed by this section may occur in a retail installment transaction that employs the precomputed add-on method for regular payment contracts using the sum

of the periodic balances, the scheduled installment earnings method, or the true daily earnings method. This section applies only to an amendment relating to the deferment of all or a part of one or more installments, and does not apply to amendments relating to renewing, restating, or rescheduling the unpaid balance under a retail installment sales contract. The parties to a retail installment sales contract may agree to modify the terms of the transaction as long as the amendment conforms to the requirements of Texas Finance Code, Chapter 348, Subchapter B.

(b) Bilateral or mutual deferment. A retail buyer and a holder may mutually agree to defer all or a part of one of more scheduled installments. Bilateral or mutual deferments must be agreed upon in writing. The signature of the retail buyer on the deferment notice denotes the retail buyer's agreement to a bilateral deferment.

(c) Deferment notice. Each deferment must be noted on the account record at the time the deferment is made. A written notice containing the conditions of the deferment must be furnished to the retail buyer as required by Texas Finance Code, §348.116. The deferment notice must include the name of the holder, the name of the retail buyer, the account number of the retail buyer, the date of the deferment, the installment or installments being deferred, the deferment period, the amount of the deferment charge, the balance on the account, and the date and amount of the next installment due.

(d) Limitation of number of installments being deferred per amendment. A holder may only defer the equivalent of three monthly installments per amendment. This limitation applies to the number of whole or partial installments that can be deferred, not the length of time an installment can be deferred.

(e) Computation of deferment charge. A holder of a retail installment sales contract under Texas Finance Code, Chapter 348 may calculate the deferment charge by any method of calculation as long as the deferment charge does not exceed the maximum amount permitted by Texas Finance Code, §348.114 and this section.

(1) Regular payment contract using sum of the periodic balances method.

(A) Base deferment charge. For a regular payment contracts employing the add-on method and the refunding method of the sum of the periodic balances, a holder may assess, charge, and collect a base deferment charge computed by:

(i) Multiplying the amount of the installment or installments being deferred by the maximum effective rate authorized for the contract;

(ii) dividing the results of clause (i) of this subparagraph by 12; and

(iii) multiplying the results of clause (ii) of this subparagraph by the number of months the installment or installments are being deferred.

(B) Additional deferment costs. In addition to the base deferment charge authorized by this section, the holder of a retail installment sales contract may collect from the retail buyer the amount of the additional cost to the holder for:

(i) premiums for continuing in force any insurance coverages provided by the retail installment contract; and

(ii) any additional necessary official fees.

(C) Minimum deferment charge. The minimum deferment charge authorized under this section is $1.00.

(2) Scheduled installment earnings method or true daily earnings method.

(A) Base deferment charge. For a regular or an irregular payment contract employing the scheduled installment earnings method or true daily earnings method, a holder may assess, charge, and collect a base deferment charge computed by:

(i) Multiplying the amount of the installment or installments being deferred by the maximum daily rate authorized for the contract; and

(ii) multiplying the results of clause (i) of this subparagraph by the actual number of days the installment or installments are being deferred.

(B) Additional deferment costs. In addition to the base deferment charge authorized by this section, the holder of a retail installment sales contract may collect from the retail buyer the amount of the additional cost to the holder for:

(i) premiums for continuing in force any insurance coverages provided by the retail installment contract; and

(ii) any additional necessary official fees.

(C) Minimum deferment charge. The minimum deferment charge authorized under this section is $1.00.

(f) Negative accrual of time price differential. In a retail installment sales contract employing the true daily earnings method, the deferment of any payment may not result in the negative accrual of the time price differential.

(g) Accounting of payment. If a payment is submitted from which a deferment charge is taken, the excess of the amount necessary to bring the account current must be applied to the remaining balance of the loan. However, any difference that exceeds $3.00 must be returned to the borrower upon the borrower's request.

(h) Noncompliance. Deferment fees not assessed or collected in accordance with the requirements of this section are subject to refund to the retail buyer. In the event deferment fees are refunded to the retail buyer, no rescheduling of the retail installment sales contract is permitted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803224
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER G. EXAMINATIONS

7 TAC §§84.702, 84.707 - 84.709

The Finance Commission of Texas (commission) proposes new §84.702 and §§84.707 - 84.709, concerning Examinations, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner.

The new rules contain new operational provisions regarding misleading advertising and recordkeeping requirements. The pur-

pose of the new operational rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. The following paragraphs outline the individual purposes of each proposed rule.

Section 84.702 describes the prohibition for licensees on misleading advertising found in Texas Finance Code, §341.403. Section 341.403 applies to transactions regulated under Subtitle B (which includes Chapter 348), Subtitle C, and Chapter 394. The rule benefits the industry by defining phrases and practices that are considered misleading. This section benefits consumers by eliminating or reducing confusing and potentially misleading advertising. The rule also references necessary compliance with federal truth in lending requirements and with provisions of the Texas Tax Code.

Section 84.707 specifies the records that must be maintained for retail sellers assigning motor vehicle retail installment sales contracts. The regulation requires a retail seller to maintain a retail installment sales transaction register, a retail installment sales transaction file for each retail installment sales transaction, assignment records, general business and accounting records supporting each disbursement made in connection with a retail installment sales transaction, advertising records, adverse action records, insurance loss registers, and litigation records. Additionally, a licensee must maintain an official correspondence file that includes all communications from the Office of Consumer Credit Commissioner and copies of correspondence and reports addressed to the commissioner. The rule is necessary to ensure that the appropriate documentation is maintained by licensed retail sellers who assign their retail installment sales contracts.

Section 84.708 specifies the records that must be maintained for retail sellers collecting installments on motor vehicle retail installment sales contracts. The regulation requires a retail seller to maintain a retail installment sales transaction register, an alphabetical index of open accounts, a retail installment sales transaction file for each retail installment sales transaction, a retail buyer's account record (including payment and collection contact history) for each retail installment sales transaction, assignment records, general business and accounting records supporting each disbursement made in connection with a retail installment sales transaction, a litigation and repossession register, advertising records, adverse action records, insurance loss registers, and litigation and repossession records. Additionally, a licensee must maintain an official correspondence file that includes all communications from the Office of Consumer Credit Commissioner and copies of correspondence and reports addressed to the commissioner. The rule is necessary to ensure that the appropriate documentation is maintained by licensed retail sellers who collect on retail installment sales contracts.

Section 84.709 specifies the records that must be maintained for holders who are not retail sellers that service or collect installments on motor vehicle retail installment sales contracts. The regulation requires a holder to a maintain a retail installment sales transaction register, an alphabetical index of open accounts, a retail installment sales transaction file for each retail installment sales transaction, a retail buyer's account record (including payment and collection contact history) for each retail installment sales transaction, assignment records, general business and accounting records supporting each disbursement made in connection with a retail installment sales transaction, a repossession and litigation register, advertising records, adverse action records, insurance loss registers, and litigation and repossession records. Additionally, a licensee must maintain an official correspondence file that includes all communications from the Office of Consumer Credit Commissioner and copies of correspondence and reports addressed to the commissioner. The rule is necessary to ensure that the appropriate documentation is maintained by licensed holders who are not retail sellers that service or collect on retail installment sales contracts.

In addition, all three recordkeeping regulations grant considerable flexibility by permitting the licensee to maintain the required records by using one of the following: a paper or manual recordkeeping system, an electronic recordkeeping system, or an optically imaged recordkeeping system unless otherwise specified by statute or regulation.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn has determined that for each year of the first five years the new operational rules are in effect the public benefit anticipated will be that the commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced.

Effective September 1, 2002, Texas Finance Code, Chapter 348 has required motor vehicle sales finance dealers to be licensed by the Office of Consumer Credit Commissioner. The agency also conducts examinations to ensure compliance with Chapter 348. The proposed new rules provide guidance and clarification for the examination process used to establish that compliance.

Regarding the recordkeeping rules (§§84.707 - 84.709), there may be some anticipated economic costs incurred by a person required to comply with this proposal. These potential costs are not predictable due to several variable factors, including the type of recordkeeping system currently used and whether the licensee presently maintains records in compliance with Chapter 348. It follows that any licensees who are currently unable to demonstrate compliance with their present recordkeeping system may experience some implied costs in order to fulfill statutory requirements.

Most if not all of the records required by §§84.707 - 84.709 are already required to be maintained in order to demonstrate compliance with Chapter 348. Thus, any costs that may be imposed by these rules would be nominal. Furthermore, many of these records are already required by the Texas Department of Transportation under regulation 43 TAC §8.144. The agency has attempted to lessen any potential costs by providing flexibility in the recordkeeping rules, which allow paper, electronic, or optically imaged systems. For example, the alphabetical index of open transactions may be maintained as a simple rolodex. Also, the other registers may be logged in a notepad or spiral notebook.

Therefore, aside from the potential nominal costs of complying with the proposed rules and the costs incurred to comply with the statute, there will be no effect on individuals required to comply with the rules as proposed. There is no anticipated adverse economic effect on small or micro-businesses.

Comments on the proposed new rules may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to lau-

rie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed rules are published in the *Texas Register*. At the conclusion of the 31st day after the proposed rules are published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

The new sections are proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The rules affect Texas Finance Code, Chapter 348.

§84.702. Misleading Advertising.

(a) Under Texas Finance Code, Subtitle B, Chapter 348 licensee must comply with Texas Finance Code, §341.403. A licensee may not, in any manner, advertise or cause to be advertised a false, misleading, or deceptive statement or representation relating to a rate, term, or condition of a motor vehicle retail installment sales contract, or advertise credit terms that the licensee does not intend to offer to retail buyers who qualify for those terms.

(b) It will be considered misleading for a licensee:

(1) to use phrases such as "lowest costs," "lowest rates," "best rates," "easy payments," or "repayment in easy installments" in an advertisement, unless the phrase used is accurate;

(2) to advertise "new reduced rates" or "a new type of service" or any similar comparative expression unless the statement is in fact accurate with respect to the business of the licensee advertised and unless the advertisement clearly indicates that the new plan refers specifically to a change in the particular licensee's plan of operation, and which change must be of more than minor importance with respect to the business of the licensee. Any such advertisement must not be used for a period longer than 60 days after the plan has been put into effect;

(3) to make any statement or representation with reference to the ease of procuring a motor vehicle retail installment sales contract, the speed with which it may be effected, the freedom from credit inquiries addressed to particular sources of information, or to any other implied differentiation in policy or service, unless the licensee will comply with the representation made; or

(4) to advertise offers to retail buyers in general or on particular classes or types of retail installment sales contracts during a certain limited time, unless in general practice, the licensee actually makes a reasonable number of the contracts within the limited time and upon the basis of the offer.

(c) A licensee is prohibited from advertising an offer of cash, rebates, or any other monetary consideration to be provided by the licensee that is not authorized under Chapter 348.

(d) Texas Finance Code, §348.009 requires licensees to comply with federal disclosure requirements. Licensees who advertise rates, terms, or conditions of a motor vehicle installment transaction must comply with the disclosure requirements of 15 U.S.C. §1640 and 12 C.F.R. §226.24 (Regulation Z).

(e) Any advertisement made by a licensee must comply with Texas Tax Code, §152.106.

§84.707. Files and Records Required (Retail Sellers Assigning Retail Installment Sales Contracts).

(a) Applicability. The recordkeeping requirements of this section apply to retail sellers that immediately assign or transfer all retail installment sales contracts to another authorized creditor. If a retail seller collects any installments, excluding downpayments, on a retail installment sales contract, the retail seller must comply with the recordkeeping requirements established under §84.708 of this title (relating to Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts)).

(b) Records required for each retail installment sales transaction. Each licensee must maintain records with respect to each motor vehicle retail installment sales contract made, acquired, serviced, or held under Texas Finance Code, Chapter 348 and make those records available for examination.

(c) Recordkeeping systems. The records required by this section may be maintained by using either a paper or manual recordkeeping system, electronic recordkeeping system, or optically imaged recordkeeping system, unless otherwise specified by statute or regulation.

(d) Records required.

(1) Retail installment sales transaction register. Each licensee must maintain a retail installment sales transaction register for each Texas Finance Code, Chapter 348 retail installment sales contract entered into by the licensee. The retail installment sales transaction register can be maintained either as a paper or an electronic record. If the retail installment sales transaction register is maintained as an electronic record, the licensee must be able to generate a separate report of the retail installment sales transaction register for each day the licensee originated or consummated a Chapter 348 retail installment sales contract. If the retail installment sales transaction register is maintained as a paper record, the retail installment sales transaction register must be maintained currently. A retail installment sales transaction register must contain the following information:

(A) date of contract (day, month, and year);

(B) retail buyer's name(s);

(C) full sixteen (16) digit vehicle identification number;

(D) account number or stock number, if the retail seller assigns an account number or stock number; and

(E) amount financed.

(2) Retail installment sales transaction file. A licensee must maintain a retail installment sales transaction file for each individual retail buyer. The retail installment sales transaction file must contain all necessary records and documents to evidence compliance with applicable state and federal laws and regulations, including the Equal Credit Opportunity Act and the Truth in Lending Act. The retail installment sales transaction file must include copies of the following records or documents:

(A) for all retail installment sales transactions:

(i) the retail installment sales contract signed by the retail buyer and the retail seller as required by Texas Finance Code, §348.101;

(ii) the purchase or buyer's order reflecting a written computation of any additional amounts that may be included in the cash price of the vehicle and itemized charges, a description of the motor vehicle being purchased, and a description of each motor vehicle being traded in;

(iii) the credit application and any other written or recorded information used in evaluating the application;

(iv) a copy of the front and back of the original or certified copy of the negotiable certificate of title to the vehicle;

(v) a copy of the completed Texas Department of Transportation's Odometer Disclosure Statement (Form VTR-40) signed by the retail buyer and seller;

(vi) the Texas Department of Transportation's Title Application Receipt (Form VTR-500-RTS), Tax Assessor's Tax Collector's Receipt for Title Application/Registration/Motor Vehicle Tax handwritten receipt (Form 31-RTS), or similar document evidencing the disbursement of the sales tax, and fees for license, title, and registration of the vehicle;

(vii) copies of any and all other documents, forms, and agreements applicable to the retail installment sales transaction signed by the retail buyer; and

(viii) any records applicable to the retail installment transaction outlined by subparagraphs (B) - (M) of this paragraph.

(B) for a vehicle titled in Texas, a copy of the completed Texas Department of Transportation/Comptroller of Public Accounts' Application for Texas Certificate of Title (Form 130-U) signed by the retail buyer and seller that was filed with the appropriate county tax assessor-collector.

(C) for a vehicle titled outside of Texas, a copy of the application for certificate of title for the buyer or the properly assigned evidence of ownership to the buyer including the Comptroller of Public Accounts' Texas Motor Vehicle Sales Tax Exemption Certificate (Form 14-312).

(D) for a retail installment sales transaction where a power of attorney is necessary to transfer title to the buyer, a copy of the Texas Department of Transportation's Power of Attorney to Transfer a Motor Vehicle (Form VTR-271) or any other similar document used as a power of attorney.

(E) for a retail installment sales transaction where the retail buyer elects to have the vehicle registered in another county as permitted by Texas Transportation Code, §501.0234, a completed copy of the Texas Department of Transportation's County of Title Issuance form (Form VTR-136) signed by the retail buyer.

(F) for a retail installment sales transaction involving a downpayment, a copy of any record or document relating to the downpayment including:

(i) receipts for cash downpayments;

(ii) promissory notes or other documents evidencing the retail buyer's agreement to pay the cash downpayment over time;

(iii) documents or forms signed by the retail buyer relating to a manufacturer's or distributor's rebate as permitted by the Texas Finance Code, §348.404(a); and

(iv) documents or forms evidencing the payoff of any trade-in vehicle shown on the retail installment sales contract.

(G) for a retail installment sales contract that has an itemized charge for the inspection of the vehicle, a copy of the work order, inspection receipt, or other verifiable evidence that reflects that the inspection was performed including the date and cost of the inspection.

(H) for a retail installment sales transaction involving the disbursement of funds for money advanced pursuant to Texas Finance Code, §348.404(b) and (c), a copy of any document, form, or agreement relating to the disbursement of funds for money advanced.

(I) for a retail installment sales transaction where insurance policies are issued by or through the licensee in connection with the retail installment sales transaction, records of the insurance policies including all certificates of insurance.

(J) for a retail installment sales transaction where ancillary products are issued by or through the licensee in connection with the retail installment sales transaction, records of the ancillary products (motor vehicle theft protection plans, service contracts, maintenance agreements, etc.) including all certificates of coverage.

(K) for a retail installment sales transaction involving insurance claims, supplemental insurance records supporting the settlement or denials of claims reported in the insurance loss registers provided by paragraph (8) of this subsection including:

(i) Life insurance claims. The supplemental insurance records for life insurance claims must include the death certificate or other written records relating to the death of the retail buyer; proof of loss or claim form that discloses the amount of indebtedness at the time of death; check copies or electronic payment receipts that reflect the gross amount of the claim paid, including the amount of insurance benefits paid to beneficiaries other than the licensee which is in excess of the net amount necessary to pay the indebtedness; and the amount that is paid to beneficiaries other than the licensee.

(ii) Accident and health insurance claims. The supplemental insurance records for accident and health insurance claims must include any written records relating to the disability, including statements from the physician, employer, and retail buyer; the proof of loss or claim form filed by the retail buyer; and copies of the checks or electronic payment receipts reflecting disability payments paid by the insurance carrier.

(iii) Involuntary unemployment insurance claims. The supplemental insurance records for involuntary unemployment insurance claims must include any written document relating to the termination, layoff, or dismissal of the retail buyer; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the involuntary unemployment insurance claim.

(iv) Collateral protection insurance claims. The supplemental insurance records for collateral protection insurance claims must include the law enforcement report, fire department report, or other written record reflecting the loss or destruction of any covered motor vehicle; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the collateral protection insurance claim.

(v) Gap insurance claims. The supplemental insurance records for a gap insurance claim must include the gap waiver agreement claim form; proof of loss and settlement check from the retail buyer's basic comprehensive, collision, or uninsured/underinsured policy or other parties' liability insurance policy for the settlement of the insured total loss of the motor vehicle; documents that provide verification of the retail buyer's primary insurance deductible; if the accident was investigated by a law enforcement officer, a copy of the offense or police report filed in connection with the total loss of the motor vehicle; if the accident was not investigated by a law enforcement officer, a copy of the Texas Department of Public Safety's "Driver's Accident Report" (Form ST-2) filed in connection with the total loss of the motor vehicle; and copies of the checks reflecting the settlement amount paid by the licensee for the gap insurance claim.

(L) for a retail installment sales transaction where separate disclosures are required by federal or state law including the following:

(i) a transaction where disclosures required by the Truth in Lending Act are not incorporated into the text of the retail installment sales contract and the credit was extended for primarily for personal, family, or household purposes, a copy of the Truth in Lending statement required by Regulation Z, Truth in Lending, 12 C.F.R. §226.18, *et seq.*;

(ii) a transaction involving a cosigner, the notice to cosigner required by the Federal Trade Commission's Credit Practices Trade regulation, 16 C.F.R. §444.3;

(iii) a transaction where a used vehicle is sold and the vehicle was purchased primarily for personal, family or household purposes, a copy of the signed Buyer's Guide required by the Federal Trade Commission's Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. §455.1, *et seq.*

(M) for a retail installment sales transaction involving legal action against the retail buyer, the records required by subsection (e) of this section.

(3) Assignment records. A licensee must maintain an assignment record, whether paper or electronic, when any Texas Finance Code, Chapter 348 retail installment sales contract made by or acquired by the licensee is assigned from its licensed or registered location. The record must show the name of the retail buyer, the account number or other unique number given to the retail buyer, the date of assignment, and the name and address to which the accounts are assigned.

(4) General business and accounting records. General business and accounting records concerning retail installment sales transactions must be maintained. The business and accounting records must include receipts, documents, or other records for each disbursement made at the retail buyer's direction or request, on his behalf, or for his benefit, including:

(A) Comptroller of Public Accounts' Dealer Motor Vehicle Inventory Tax Statement (Form 50-246); and

(B) Comptroller of Public Accounts' Texas Motor Vehicle Seller-Financed Sales Tax Report (Form 14-117);

(5) Advertising records.

(A) Each licensee must maintain, either at the licensed office or at a principal Texas office, so designated to the commissioner, a complete record of all written and electronic communications soliciting retail installment sales transactions (including scripts of radio and television broadcasts, and reproductions of billboards and signs not at the licensed place of business) for a period of not less than two years from the date of use. The date or period of use of each solicitation or advertisement must be indicated.

(B) If any language other than English is used in any advertising material, a true and correct translation must appear along with the advertising material.

(6) Adverse action records. Each licensee must maintain a record of all applications relating to Texas Finance Code, Chapter 348 retail installment sales transactions where the applicant was denied credit. The record must include those records and documents required by Regulation B, Equal Credit Opportunity Act, 12 C.F.R. §202.1 *et seq.*, including the credit application; any written or recorded information used in evaluating the application; the adverse action notice (if required); notice of incompleteness, if applicable; and counteroffer notice, if applicable.

(7) Official correspondence file. Each licensee must maintain a separate file for all communications from the Office of Consumer Credit Commissioner and for copies of correspondence and reports addressed to the commissioner. This file must include examination reports issued by the commissioner. Each licensee must have a copy of the Texas Credit Title and applicable regulations readily available.

(8) Insurance loss registers. Each licensee must maintain a register, paper or electronic, reflecting information on life, accident and health, personal property, involuntary unemployment, and single-interest insurance claims whether paid or denied by the insurance carrier. If the reason for the denial of a life insurance or an accident and health insurance claim is based upon the medical records of the retail buyer, supplemental records supporting the denial of the claim must be made available upon request.

(A) Life insurance claims. The register pertaining to life insurance claims must show the name of the retail buyer, the account number, and the date of death.

(B) Accident and health insurance claims. The register pertaining to accident and health insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of a claim for any continuous period of disability.

(C) Involuntary unemployment insurance claims. The register pertaining to involuntary unemployment insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of the claim.

(D) Gap insurance claims. The register pertaining to gap insurance claims must show the name of the retail buyer, the account number, the date of the claim, and the amount of the settlement.

(E) Collateral protection insurance claims. The register pertaining to collateral protection insurance claims must show the name of the retail buyer, the account number, the amount of the insurance written on the motor vehicle, the amount of the settlement, and a notation as to the basis of the settlement (actual cash value, repair, or the remaining outstanding balance).

(9) Retention and availability of records. All books and records required by this subsection must be available for inspection at any time by Office of Consumer Credit Commissioner staff, and must be retained for a period of four years from the date of the contract. Upon notification of an examination pursuant to Texas Finance Code, §348.514(f), the licensee must have the required books and records at the licensed location or registered office specified on the license. The records required by this subsection must be kept at an office in the state designated by the licensee except when the retail installment sales contracts are transferred under an agreement which gives the commissioner access to the documents. Documents may be maintained out of state if the licensee has in writing acknowledged responsibility for either making the records available within the state for examination or by acknowledging responsibility for additional examination costs associated with examinations conducted out of state.

(e) Litigation records. For a retail installment sales transaction involving legal action against the retail buyer, the following written or recorded records must be maintained, including:

(1) a copy of the original petition and the most current amended petition, if any;

(2) proof of judgment if a judgment is taken and amounts awarded by the court;

(3) copies of legal documents filed with a court of competent jurisdiction relating to writ of sequestration, hindering of secured creditor claim, or any other legal claim filed against the retail buyer;

(4) the date and terms of settlement if settlement is made between the retail buyer and the licensee before judgment.

§84.708. Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts).

(a) Applicability. The recordkeeping requirements of this section apply to retail sellers that service or collect installments on retail installment sales contracts.

(b) Records required for each retail installment sales transaction. Each licensee must maintain records with respect to each motor vehicle retail installment sales contract made, acquired, serviced, or held under Texas Finance Code, Chapter 348 and make those records available for examination.

(c) Recordkeeping systems. The records required by this section may be maintained by using either a paper or manual recordkeeping system, electronic recordkeeping system, or optically imaged recordkeeping system, unless otherwise specified by statute or regulation.

(d) Records required.

(1) Retail installment sales transaction register. Each licensee must maintain a retail installment sales transaction register for each Texas Finance Code, Chapter 348 retail installment sales contract entered into by the licensee. The retail installment sales transaction register can be maintained either as a paper or an electronic record. If the retail installment sales transaction register is maintained as an electronic record, the licensee must be able to generate a separate report of the retail installment sales transaction register for each day the licensee originated or consummated a Chapter 348 retail installment sales contract. If the retail installment sales transaction register is maintained as a paper record, the retail installment sales transaction register must be maintained currently. A retail installment sales transaction register must contain the following information:

(A) date of contract (day, month, and year);

(B) retail buyer's name(s);

(C) full 16-digit vehicle identification number;

(D) account number, issued in ascending chronological sequence; and

(E) amount financed.

(2) Alphabetical index of open transactions. An alphabetical index of open retail installment sales transactions showing the full name of each retail buyer, the account number assigned each retail installment sales transaction, and the amount financed for each retail installment sales transaction must be maintained. A licensee may maintain the alphabetical index of open transactions either as a paper or an electronic record. If the alphabetical index of open transactions is maintained as an electronic record, the licensee must be able to generate a separate report of open transactions in strict alphabetical order. A licensee may maintain the alphabetical index of open transactions by creating a rolodex. For licensees using a manual recordkeeping system, a list of open transactions may be maintained in lieu of an alphabetical index. The manual recordkeeping system for maintaining the alphabetical index or list of open transactions must be currently maintained.

(3) Retail installment sales transaction file. A licensee must maintain a retail installment sales transaction file for each individual retail buyer. The retail installment sales transaction file must contain all necessary records and documents to evidence compliance with applicable state and federal laws and regulations, including the Equal Credit Opportunity Act and the Truth in Lending Act. The retail installment sales transaction file must include copies of the following records or documents:

(A) for all retail installment sales transactions:

(i) the retail installment sales contract signed by the retail buyer and the retail seller as required by Texas Finance Code, §348.101;

(ii) the purchase or buyer's order reflecting a written computation of any additional amounts that may be included in the cash price of the vehicle and itemized charges, a description of the motor vehicle being purchased, and a description of each motor vehicle being traded in;

(iii) the credit application and any other written or recorded information used in evaluating the application;

(iv) a copy of the front and back of the original or certified copy of the negotiable certificate of title to the vehicle;

(v) a copy of the completed Texas Department of Transportation's Odometer Disclosure Statement (Form VTR-40) signed by the retail buyer and seller;

(vi) the Texas Department of Transportation's Title Application Receipt (Form VTR-500-RTS), Tax Assessor's Tax Collector's Receipt for Title Application/Registration/Motor Vehicle Tax handwritten receipt (Form 31-RTS), or similar document evidencing the disbursement of the sales tax, and fees for license, title, and registration of the vehicle;

(vii) copies of any and all other documents, forms, and agreements applicable to the retail installment sales transaction signed by the retail buyer; and

(viii) any records applicable to the retail installment transaction outlined by subparagraphs (B) - (O) of this paragraph.

(B) for a vehicle titled in Texas, a copy of the completed Texas Department of Transportation/Comptroller of Public Accounts' Application for Texas Certificate of Title (Form 130-U) signed by the retail buyer and seller that was filed with the appropriate county tax assessor-collector.

(C) for a vehicle titled outside of Texas, a copy of the application for certificate of title for the buyer or the properly assigned evidence of ownership to the buyer including the Comptroller of Public Accounts' Texas Motor Vehicle Sales Tax Exemption Certificate (Form 14-312).

(D) for a retail installment sales transaction where a power of attorney is necessary to transfer title to the buyer, a copy of the Texas Department of Transportation's Power of Attorney to Transfer a Motor Vehicle (Form VTR-271) or any other similar document used as a power of attorney.

(E) for a retail installment sales transaction where the retail buyer elects to have the vehicle registered in another county as permitted by Texas Transportation Code, §501.0234, a completed copy of the Texas Department of Transportation's County of Title Issuance form (Form VTR-136) signed by the retail buyer.

(F) for a retail installment sales transaction involving a downpayment, a copy of any record or document relating to the downpayment including:

(i) receipts for cash downpayments;

(ii) promissory notes or other documents evidencing the retail buyer's agreement to pay the cash downpayment over time;

(iii) documents or forms signed by the retail buyer relating to a manufacturer's or distributor's rebate as permitted by the Texas Finance Code, §348.404(a); and

(iv) documents or forms evidencing the payoff of any trade-in vehicle shown on the retail installment sales contract.

(G) for a retail installment sales contract that has an itemized charge for the inspection of the vehicle, a copy of the work order, inspection receipt, or other verifiable evidence that reflects that the inspection was performed including the date and cost of the inspection.

(H) for a retail installment sales transaction involving the disbursement of funds for money advanced pursuant to Texas Finance Code, §348.404(b) and (c), a copy of any document, form, or agreement relating to the disbursement of funds for money advanced.

(I) for a retail installment sales transaction where insurance policies are issued by or through the licensee in connection with the retail installment sales transaction, records of the insurance policies including all certificates of insurance.

(J) for a retail installment sales transaction where ancillary products are issued by or through the licensee in connection with the retail installment sales transaction, records of the ancillary products (motor vehicle theft protection plans, service contracts, maintenance agreements, etc.) including all certificates of coverage.

(K) for a retail installment sales transaction involving insurance claims, supplemental insurance records supporting the settlement or denials of claims reported in the insurance loss registers provided by paragraph (8) of this subsection including:

(i) Life insurance claims. The supplemental insurance records for life insurance claims must include the death certificate or other written records relating to the death of the retail buyer; proof of loss or claim form that discloses the amount of indebtedness at the time of death; check copies or electronic payment receipts that reflect the gross amount of the claim paid, including the amount of insurance benefits paid to beneficiaries other than the licensee which is in excess of the net amount necessary to pay the indebtedness; and the amount that is paid to beneficiaries other than the licensee.

(ii) Accident and health insurance claims. The supplemental insurance records for accident and health insurance claims must include any written records relating to the disability, including statements from the physician, employer, and retail buyer; the proof of loss or claim form filed by the retail buyer; and copies of the checks or electronic payment receipts reflecting disability payments paid by the insurance carrier.

(iii) Involuntary unemployment insurance claims. The supplemental insurance records for involuntary unemployment insurance claims must include any written document relating to the termination, layoff, or dismissal of the retail buyer; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the involuntary unemployment insurance claim.

(iv) Collateral protection insurance claims. The supplemental insurance records for collateral protection insurance claims must include the law enforcement report, fire department report, or other written record reflecting the loss or destruction of any covered motor vehicle; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the collateral protection insurance claim.

(v) Gap insurance claims. The supplemental insurance records for a gap insurance claim must include the gap waiver agreement claim form; proof of loss and settlement check from the retail buyer's basic comprehensive, collision, or uninsured/underinsured policy or other parties' liability insurance policy for the settlement of the insured total loss of the motor vehicle; documents that provide verification of the retail buyer's primary insurance deductible; if the accident was investigated by a law enforcement officer, a copy of the offense or police report filed in connection with the total loss of the motor vehicle; if the accident was not investigated by a law enforcement officer, a copy of the Texas Department of Public Safety's "Driver's Accident Report" (Form ST-2) filed in connection with the total loss of the motor vehicle; and copies of the checks reflecting the settlement amount paid by the licensee for the gap insurance claim.

(L) for a retail installment sales transaction where separate disclosures are required by federal or state law including the following:

(i) a transaction where disclosures required by the Truth in Lending Act are not incorporated into the text of the retail installment sales contract and the credit was extended for primarily for personal, family, or household purposes, a copy of the Truth in Lending statement required by Regulation Z, Truth in Lending, 12 C.F.R. §226.18, *et seq.*;

(ii) a transaction involving a cosigner, the notice to cosigner required by the Federal Trade Commission's Credit Practices Trade regulation, 16 C.F.R. §444.3;

(iii) a transaction where a used vehicle is sold and the vehicle was purchased primarily for personal, family or household purposes, a copy of the signed Buyer's Guide required by the Federal Trade Commission's Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. §455.1, *et seq.*

(M) for a retail installment sales transaction that has been repaid in full, copies of any documents or records evidencing the discharge or release of lien as prescribed by 43 Texas Administrative Code §17.3(h).

(N) for a retail installment sales transaction involving legal action against the retail buyer, the records required by subsection (e) of this section.

(O) for a retail installment sales transaction involving a repossession, the records required by subsection (f) of this section.

(4) Retail buyer's account record (including payment and collection contact history). A separate paper or electronic record must be maintained for the account of each retail buyer. The paper or electronic retail buyer's account record must be readily available by reference to either a name or account number. The retail buyer's account record must contain at least the following information on each retail installment sales transaction:

(A) account number as recorded in the retail installment sales transaction register;

(B) retail installment sales contract schedule and terms itemized to show:

(i) date of contract;

(ii) number of installments;

(iii) due date of installments;

(iv) amount of each installment; and

(v) maturity date;

(C) name, address, and telephone number of retail buyer;

(D) names and addresses of co-retail buyer or other obligors, if any;

(E) amount financed;

(F) total time price differential charge;

(G) total of payments;

(H) amount of premium charges for insurance products itemized to show:

(i) credit life insurance;

(ii) credit accident and health (disability) insurance;

(iii) involuntary unemployment insurance;

(iv) collateral protection insurance (single-interest or dual-interest coverage); and

(v) gap insurance;

(I) Individual payment entries itemized to show:

(i) date payment received; dual postings are acceptable if date of posting is other than date of receipt;

(ii) for a retail installment sales contract employing the add-on method or the scheduled installment earnings method, the amounts received from the retail buyer or other parties;

(iii) for a retail installment sales contract employing the true daily earnings method, the installment amounts applied to principal, time price differential, and other charges;

(iv) amounts received for default, deferment, or other authorized charges;

(J) Refunds of unearned time price differential, insurance charges, and authorized ancillary products, if any. A licensee is responsible for substantiating final entries and that refunds were paid to the retail buyer. Refund amounts must be itemized to show:

(i) time price differential refunded;

(ii) credit life, accident and health, involuntary unemployment, collateral protection (single-interest or dual-interest coverage), and gap insurance charges refunded, showing separately the refund applicable to each separate insurance policy or coverage;

(iii) authorized ancillary products charges refunded;

(K) Collection contact history. A licensee must make a written or an electronic record of each and every contact made by a licensee with the retail buyer or any other person related to the retail installment sales transaction. The written or electronic record must also include every contact made by the retail buyer with the licensee. The written record must include the date, method of contact, contacted party, person initiating the contact, and a summary of the contact. Copies of collection notices or letters must be maintained by the licensee; and

(L) Corrective entries. A licensee may make corrective entries to the retail buyer's account record if the corrective entry is justified. A licensee must maintain the reason and supporting documentation for each corrective entry made to the retail buyer's account record. The reason for the corrective entry may be recorded in the collection contact history of the retail buyer's account record. The supporting documentation justifying the corrective entry can be maintained in the individual retail buyer's account file or properly stored and indexed in a licensee's optically imaged recordkeeping system. If a licensee manually maintains the retail buyer's account record, the licensee must properly correct an improper entry by drawing a single line through the improper entry and entering the correct information above or below the improper entry. No erasures or other obliterations may be made on the payments received or collection contact history section of the manual retail buyer's account record.

(5) Assignment records. A licensee must maintain an assignment record, whether paper or electronic, when any Texas Finance Code, Chapter 348 retail installment sales contract made by or acquired by the licensee is assigned from its licensed or registered location. The record must show the name of the retail buyer, the account number given to the retail buyer, the date of assignment, and the name and address to which the accounts are assigned.

(6) General business and accounting records. General business and accounting records concerning retail installment sales transactions must be maintained. The business and accounting records must include receipts, documents, or other records for each disbursement made at the retail buyer's direction or request, on his behalf, or for his benefit, including:

(A) Comptroller of Public Accounts' Dealer Motor Vehicle Inventory Tax Statement (Form 50-246);

(B) Comptroller of Public Accounts' Texas Motor Vehicle Seller-Financed Sales Tax Report (Form 14-117); and

(C) repossession, foreclosure, or legal fees applied to the retail buyer's account.

(7) Records of loans in litigation and repossession.

(A) An index of each legal action by or against the licensee as it is initiated and each repossession as it occurs must be recorded. The index must show the retail buyer's name, account number, and date of action. If accounts have been assigned, it must be noted in this index as well as on the record of assigned accounts as prescribed in paragraph (5) of this subsection.

(B) The licensee must maintain the records relating to litigation and repossession accounts with the index described by subparagraph (A) of this paragraph or in the retail installment sales transaction file required by paragraph (3) of this subsection. The licensee must maintain the litigation and repossession records required by subsections (e) and (f) of this section.

(8) Insurance loss registers. Each licensee must maintain a register, paper or electronic, reflecting information on life, accident and health, personal property, involuntary unemployment, and single-interest insurance claims whether paid or denied by the insurance carrier. If the reason for the denial of a life insurance or an accident and health insurance claim is based upon the medical records of the retail buyer, supplemental records supporting the denial of the claim must be made available upon request.

(A) Life insurance claims. The register pertaining to life insurance claims must show the name of the retail buyer, the account number, and the date of death.

(B) Accident and health insurance claims. The register pertaining to accident and health insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of a claim for any continuous period of disability.

(C) Involuntary unemployment insurance claims. The register pertaining to involuntary unemployment insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of the claim.

(D) Gap insurance claims. The register pertaining to gap insurance claims must show the name of the retail buyer, the account number, the date of the claim, and the amount of the settlement.

(E) Collateral protection insurance claims. The register pertaining to collateral protection insurance claims must show the name of the retail buyer, the account number, the amount of the insurance written on the motor vehicle, the amount of the settlement, and a notation as to the basis of the settlement (actual cash value, repair, or the remaining outstanding balance).

(9) Advertising records.

(A) Each licensee must maintain, either at the licensed office or at a principal Texas office, so designated to the commissioner, a complete record of all written and electronic communications soliciting retail installment sales transactions (including scripts of radio and television broadcasts, and reproductions of billboards and signs not at the licensed place of business) for a period of not less than two years from the date of use. The date or period of use of each solicitation or advertisement must be indicated.

(B) If any language other than English is used in any advertising material, a true and correct translation must appear along with the advertising material.

(10) Adverse action records. Each licensee must maintain a record of all applications relating to Texas Finance Code, Chapter 348 retail installment sales transactions where the applicant was denied credit. The record must include those records and documents required by Regulation B, Equal Credit Opportunity Act, 12 C.F.R. §202.1 *et seq.*, including the credit application; any written or recorded information used in evaluating the application; the adverse action notice (if required); notice of incompleteness, if applicable; and counteroffer notice, if applicable.

(11) Official correspondence file. Each licensee must maintain a separate file for all communications from the Office of Consumer Credit Commissioner and for copies of correspondence and reports addressed to the commissioner. This file must include a copy of the examination reports issued by the commissioner. Each licensee must have a copy of the Texas Credit Title and applicable regulations readily available.

(12) Retention and availability of records. All books and records required by this subsection must be available for inspection at any time by Office of Consumer Credit Commissioner staff, and must be retained for a period of four years from the date of the contract, or two years from the date of the final entry made thereon, whichever is later. Upon notification of an examination pursuant to Texas Finance Code, §348.514(f), the licensee must have the required books and records at the licensed location or registered office specified on the license. The records required by this subsection must be kept at an office in the state designated by the licensee except when the retail installment sales transactions are transferred under an agreement which gives the commissioner access to the documents. Documents may be maintained out of state if the licensee has in writing acknowledged responsibility for either making the records available within the state for examination or by acknowledging responsibility for additional examination costs associated with examinations conducted out of state.

(e) Litigation records. For a retail installment sales transaction involving legal action against the retail buyer, the following written or recorded records must be maintained, including:

(1) a copy of the original petition and the most current amended petition, if any;

(2) proof of judgment if a judgment is taken and amounts awarded by the court;

(3) copies of legal documents filed with a court of competent jurisdiction relating to writ of sequestration, hindering of secured creditor claim, or any other legal claim filed against the retail buyer;

(4) the date and terms of settlement if settlement is made between the retail buyer and the licensee before judgment.

(f) Repossession records. For a retail installment sales transaction involving the repossession of the vehicle, the following written or recorded records must be maintained, including:

(1) a condition report indicating the condition of the collateral;

(2) any invoices or receipts for any reasonable and authorized out-of-pocket expenses incurred in connection with the repossession or sequestration of the vehicle including cost of storing, reconditioning, and reselling the vehicle;

(3) for a vehicle disposed of in a public or private sale as permitted by the Texas Business and Commerce Code, §9.610, the following documents:

(A) one of the three following notices:

(i) for a transaction not involving consumer goods, a copy of any Notification of Disposition of Collateral letter sent to the retail buyer and other obligors as required by Texas Business and Commerce Code, §9.613;

(ii) for a transaction involving consumer goods, a copy of any Notice of Our Plan to Sell Property as sent to the retail buyer and other obligors as required by Texas Business and Commerce Code, §9.614; or

(iii) a copy of the waiver of the notice of intended disposition prescribed by clause (i) or (ii) of this subparagraph, as applicable, signed by the retail buyer and other obligors after default;

(B) copies of any evidence of a fair private sale or the commercial reasonableness of the private sale such as three bids or other documents relating to the disposition of the collateral in a private sale. The bids must include the name of the bidder, address of the bidder, and amount of the bid;

(C) copies of the auction receipts reflecting the commercial reasonableness of the sale if the vehicle's disposition is by a public sale or a dealer-only auction;

(D) the bill of sale showing the name and address of the purchaser of the repossessed collateral and the purchase price of the vehicle;

(E) for a disposition or sale of collateral creating a surplus balance, a copy of the check representing the payment of the surplus balance paid to the retail buyer or other obligors;

(F) for a disposition or sale of collateral resulting in a surplus or deficiency, a copy of the explanation of calculation of surplus or deficiency as required by Texas Business and Commerce Code, §9.616, if applicable;

(G) a copy of the waiver of the deficiency letter if the retail seller elects to waive the deficiency balance in lieu of sending the explanation of calculation of surplus or deficiency form;

(4) for a vehicle disposed of using the strict foreclosure method as permitted by the Texas Business and Commerce Code, §9.620 and §9.621, the following documents:

(A) one of the three following notices;

(i) for a transaction not involving consumer goods and where less than 60% of the cash price of the vehicle has been paid, a copy of the notice of proposal to accept collateral in full or partial satisfaction of the obligation;

(ii) for a transaction involving consumer goods, a copy of the notice of proposal to accept collateral in full satisfaction of the obligation; or

(iii) for a transaction where more than 60% of the cash price of the vehicle has been paid, a copy of the debtor or obligor's waiver of compulsory disposition of collateral signed by the retail buyers and other obligors after default;

(B) for a transaction where the retail buyer rejects the offer under subparagraph (A)(i) or (ii) of this paragraph, a copy of the retail buyer's signed objection to retention of the collateral;

(C) copies of the records reflecting the partial or total satisfaction of the obligation; and

(5) for a vehicle disposed by another authorized method pursuant to the Texas Business and Commerce Code, Chapter 9, a copy of any and all records or documents relating to the disposition of the collateral.

§84.709. Files and Records Required (Holders Taking Assignment of Retail Installment Sales Contracts).

(a) Applicability. The recordkeeping requirements of this section apply to holders who are not retail sellers that service or collect installments on retail installment sales contracts.

(b) Records required for each retail installment sales transaction. Each licensee must maintain records with respect to each motor vehicle retail installment sales contract made, acquired, serviced, or held under Texas Finance Code, Chapter 348 and make those records available for examination.

(c) Recordkeeping systems. The records required by this section may be maintained by using either a paper or manual recordkeeping system, electronic recordkeeping system, or optically imaged recordkeeping system, unless otherwise specified by statute or regulation.

(d) Records required.

(1) Retail installment sales transaction register. Each licensee must maintain a retail installment sales transaction register for each Texas Finance Code, Chapter 348 retail installment sales contract acquired by the licensee. The retail installment sales transaction register can be maintained either as a paper or an electronic record. If the retail installment sales transaction register is maintained as an electronic record, the licensee must be able to generate a separate report of the retail installment sales transaction register for each day the licensee acquires a Chapter 348 retail installment sales contract. If the retail installment sales transaction register is maintained as a paper record, the retail installment sales transaction register must be maintained currently. A retail installment sales transaction register must contain the following information:

(A) date of contract (day, month, and year);

(B) retail buyer's name(s);

(C) full 16-digit vehicle identification number;

(D) account number, issued in ascending chronological sequence; and

(E) amount financed.

(2) Alphabetical index of open transactions. An alphabetical index of open retail installment sales transactions showing the full name of each retail buyer, the account number assigned each retail installment sales transaction, and the amount financed for each retail installment sales transaction must be maintained. A licensee may maintain the alphabetical index of open transactions either as a paper or an electronic record. If the alphabetical index of open transactions is maintained as an electronic record, the licensee must be able to generate a separate report of open transactions in strict alphabetical order. A licensee may maintain the alphabetical index of open transactions by creating a rolodex. For licensees using a manual recordkeeping system, a list of open transactions may be maintained in lieu of an alphabetical index. The manual recordkeeping system for maintaining the alphabetical index or list of open transactions must be currently maintained.

(3) Retail installment sales transaction file. A licensee must maintain a retail installment sales transaction file for each individual retail buyer. The retail installment sales transaction file must contain all necessary records and documents to evidence compliance with applicable state and federal laws and regulations, including the Equal Credit Opportunity Act and the Truth in Lending Act. The retail installment sales transaction file must include copies of the following records or documents:

(A) for all retail installment sales transactions:

(i) the retail installment sales contract signed by the retail buyer and the retail seller as required by Texas Finance Code, §348.101;

(ii) the credit application and any other written or recorded information used in evaluating the application;

(iii) a copy of the front and back of the original or certified copy of the negotiable certificate of title to the vehicle;

(iv) the Texas Department of Transportation's Title Application Receipt (Form VTR-500-RTS), Tax Assessor's Tax Collector's Receipt for Title Application/Registration/Motor Vehicle Tax handwritten receipt (Form 31-RTS), or similar document evidencing the disbursement of the sales tax, and fees for license, title, and registration of the vehicle;

(v) copies of any and all other documents, forms, and agreements applicable to the retail installment sales transaction signed by the retail buyer; and

(vi) any records applicable to the retail installment transaction outlined by subparagraphs (B) - (K) of this paragraph.

(B) for a vehicle titled in Texas, a copy of the completed Texas Department of Transportation/Comptroller of Public Accounts' Application for Texas Certificate of Title (Form 130-U) signed by the retail buyer and seller that was filed with the appropriate county tax assessor-collector.

(C) for a vehicle titled outside of Texas, a copy of the application for certificate of title for the buyer or the properly assigned evidence of ownership to the buyer including the Comptroller of Public Accounts' Texas Motor Vehicle Sales Tax Exemption Certificate (Form 14-312).

(D) for a retail installment sales contract that has an itemized charge for the inspection of the vehicle, a copy of the work order, inspection receipt, or other verifiable evidence that reflects that the inspection was performed including the date and cost of the inspection.

(E) for a retail installment sales transaction where insurance policies are issued by or through the licensee in connection with

the retail installment sales transaction, records of the insurance policies including all certificates of insurance.

(F) for a retail installment sales transaction where ancillary products are issued by or through the licensee in connection with the retail installment sales transaction, records of the ancillary products (motor vehicle theft protection plans, service contracts, maintenance agreements, etc.) including all certificates of coverage.

(G) for a retail installment sales transaction involving insurance claims, supplemental insurance records supporting the settlement or denials of claims reported in the insurance loss registers provided by paragraph (8) of this subsection including:

(i) Life insurance claims. The supplemental insurance records for life insurance claims must include the death certificate or other written records relating to the death of the retail buyer; proof of loss or claim form that discloses the amount of indebtedness at the time of death; check copies or electronic payment receipts that reflect the gross amount of the claim paid, including the amount of insurance benefits paid to beneficiaries other than the licensee which is in excess of the net amount necessary to pay the indebtedness; and the amount that is paid to beneficiaries other than the licensee.

(ii) Accident and health insurance claims. The supplemental insurance records for accident and health insurance claims must include any written records relating to the disability, including statements from the physician, employer, and retail buyer; the proof of loss or claim form filed by the retail buyer; and copies of the checks or electronic payment receipts reflecting disability payments paid by the insurance carrier.

(iii) Involuntary unemployment insurance claims. The supplemental insurance records for involuntary unemployment insurance claims must include any written document relating to the termination, layoff, or dismissal of the retail buyer; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the involuntary unemployment insurance claim.

(iv) Collateral protection insurance claims. The supplemental insurance records for collateral protection insurance claims must include the law enforcement report, fire department report, or other written record reflecting the loss or destruction of any covered motor vehicle; the proof of loss or claim form filed by the retail buyer; copies of the checks or electronic payment receipts reflecting the payment of the claim by the insurance carrier; and any other pertinent written record relating to the collateral protection insurance claim.

(v) Gap insurance claims. The supplemental insurance records for a gap insurance claim must include the gap waiver agreement claim form; proof of loss and settlement check from the retail buyer's basic comprehensive, collision, or uninsured/underinsured policy or other parties' liability insurance policy for the settlement of the insured total loss of the motor vehicle; documents that provide verification of the retail buyer's primary insurance deductible; if the accident was investigated by a law enforcement officer, a copy of the offense or police report filed in connection with the total loss of the motor vehicle; if the accident was not investigated by a law enforcement officer, a copy of the Texas Department of Public Safety's "Driver's Accident Report" (Form ST-2) filed in connection with the total loss of the motor vehicle; and copies of the checks reflecting the settlement amount paid by the licensee for the gap insurance claim.

(H) for a retail installment sales transaction where separate disclosures are required by federal or state law including the following:

(i) a transaction where disclosures required by the Truth in Lending Act are not incorporated into the text of the retail installment sales contract and the credit was extended for primarily for personal, family, or household purposes, a copy of the Truth in Lending statement required by Regulation Z, Truth in Lending, 12 C.F.R. §226.18, *et seq.*;

(ii) a transaction involving a cosigner, the notice to cosigner required by the Federal Trade Commission's Credit Practices Trade regulation, 16 C.F.R. §444.3;

(iii) a transaction where a used vehicle is sold and the vehicle was purchased primarily for personal, family or household purposes, a copy of the signed Buyer's Guide required by the Federal Trade Commission's Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. §455.1, *et seq.*

(I) for a retail installment sales transaction that has been repaid in full, copies of any documents or records evidencing the discharge or release of lien as prescribed by 43 Texas Administrative Code §17.3(h).

(J) for a retail installment sales transaction involving legal action against the retail buyer, the records required by subsection (e) of this section.

(K) for a retail installment sales transaction involving a repossession, the records required by subsection (f) of this section.

(4) Retail buyer's account record (including payment and collection contact history). A separate paper or electronic record must be maintained for the account of each retail buyer. The paper or electronic retail buyer's account record must be readily available by reference to either a name or account number. The retail buyer's account record must contain at least the following information on each retail installment sales transaction:

(A) account number as recorded in the retail installment sales transaction register;

(B) retail installment sales contract schedule and terms itemized to show:

(i) date of contract;

(ii) number of installments;

(iii) due date of installments;

(iv) amount of each installment; and

(v) maturity date;

(C) name, address, and telephone number of retail buyer;

(D) names and addresses of co-retail buyer or other obligors, if any;

(E) amount financed;

(F) total time price differential charge;

(G) total of payments;

(H) amount of premium charges for insurance products itemized to show:

(i) credit life insurance;

(ii) credit accident and health (disability) insurance;

(iii) involuntary unemployment insurance;

(iv) collateral protection insurance (single-interest or dual-interest coverage); and

(v) gap insurance;

(I) Individual payment entries itemized to show:

(i) date payment received; dual postings are acceptable if date of posting is other than date of receipt;

(ii) for a retail installment sales contract employing the add-on method or the scheduled installment earnings method, the amounts received from the retail buyer or other parties;

(iii) for a retail installment sales contract employing the true daily earnings method, the installment amounts applied to principal, time price differential, and other charges;

(iv) amounts received for default, deferment, or other authorized charges;

(J) Refunds of unearned time price differential, insurance charges, and authorized ancillary products, if any. A licensee is responsible for substantiating final entries and that refunds were paid to the retail buyer. Refund amounts must be itemized to show:

(i) time price differential refunded;

(ii) credit life, accident and health, involuntary unemployment, collateral protection (single-interest or dual-interest coverage), and gap insurance charges refunded, showing separately the refund applicable to each separate insurance policy or coverage;

(iii) authorized ancillary products charges refunded;

(K) Collection contact history. A licensee must make a written or an electronic record of each and every contact made by a licensee with the retail buyer or any other person related to the retail installment sales transaction. The written or electronic record must also include every contact made by the retail buyer with the licensee. The written record must include the date, method of contact, contacted party, person initiating the contact, and a summary of the contact. Copies of the collection notices or letters must be maintained by the licensee; and

(L) Corrective entries. A licensee may make corrective entries to the retail buyer's account record if the corrective entry is justified. A licensee must maintain the reason and supporting documentation for each corrective entry made to the retail buyer's account record. The reason for the corrective entry may be recorded in the collection contact history of the retail buyer's account record. The supporting documentation justifying the corrective entry can be maintained in the individual retail buyer's account file or properly stored and indexed in a licensee's optically imaged recordkeeping system. If a licensee manually maintains the retail buyer's account record, the licensee must properly correct an improper entry by drawing a single line through the improper entry and entering the correct information above or below the improper entry. No erasures or other obliterations may be made on the payments received or collection contact history section of the manual retail buyer's account record.

(5) Assignment records. A licensee must maintain an assignment record, whether paper or electronic, when any Texas Finance Code, Chapter 348 retail installment sales contract acquired by the licensee is subsequently assigned from its licensed or registered location. The record must show the name of the retail buyer, the account number given to the retail buyer, the date of assignment, and the name and address to which the accounts are assigned.

(6) General business and accounting records. General business and accounting records concerning retail installment sales transactions must be maintained. The business and accounting records must include receipts, documents, or other records for each disbursement made at the retail buyer's direction or request, on his behalf, or for his benefit, including repossession, foreclosure, or legal fees applied to the retail buyer's account.

(7) Records of loans in litigation and repossession.

(A) An index of each legal action by or against the licensee as it is initiated and each repossession as it occurs must be recorded. The index must show the retail buyer's name, account number, and date of action. If accounts have been subsequently assigned, it must be noted in this index as well as on the record of assigned accounts as prescribed in paragraph (5) of this subsection.

(B) The licensee must maintain the records relating to litigation and repossession accounts with the index described by subparagraph (A) of this paragraph or in the retail installment sales transaction file required by paragraph (3) of this subsection. The licensee must maintain the litigation and repossession records required by subsections (e) and (f) of this section.

(8) Insurance loss registers. Each licensee must maintain a register, paper or electronic, reflecting information on life, accident and health, personal property, involuntary unemployment, and single-interest insurance claims whether paid or denied by the insurance carrier. If the reason for the denial of a life insurance or an accident and health insurance claim is based upon the medical records of the retail buyer, supplemental records supporting the denial of the claim must be made available upon request.

(A) Life insurance claims. The register pertaining to life insurance claims must show the name of the retail buyer, the account number, and the date of death.

(B) Accident and health insurance claims. The register pertaining to accident and health insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of a claim for any continuous period of disability.

(C) Involuntary unemployment insurance claims. The register pertaining to involuntary unemployment insurance claims must show the name of the retail buyer, the account number, and the date of the initial filing of the claim.

(D) Gap insurance claims. The register pertaining to gap insurance claims must show the name of the retail buyer, the account number, the date of the claim, and the amount of the settlement.

(E) Collateral protection insurance claims. The register pertaining to collateral protection insurance claims must show the name of the retail buyer, the account number, the amount of the insurance written on the motor vehicle, the amount of the settlement, and a notation as to the basis of the settlement (actual cash value, repair, or the remaining outstanding balance).

(9) Advertising records.

(A) Each licensee must maintain, either at the licensed office or at a principal Texas office, so designated to the commissioner, a complete record of all written and electronic communications soliciting retail installment sales transactions (including scripts of radio and television broadcasts, and reproductions of billboards and signs not at the licensed place of business) for a period of not less than two years from the date of use. The date or period of use of each solicitation or advertisement must be indicated.

(B) If any language other than English is used in any advertising material, a true and correct translation must appear along with the advertising material.

(10) Adverse action records. Each licensee must maintain a record of all applications relating to Texas Finance Code, Chapter 348 retail installment sales transactions where the applicant was denied

credit. The record must include those records and documents required by Regulation B, Equal Credit Opportunity Act, 12 C.F.R. §202.1 *et seq.*, including the credit application; any written or recorded information used in evaluating the application; the adverse action notice (if required); notice of incompleteness, if applicable; and counteroffer notice, if applicable.

(11) Official correspondence file. Each licensee must maintain a separate file for all communications from the Office of Consumer Credit Commissioner and for copies of correspondence and reports addressed to the commissioner. This file must include a copy of the examination reports issued by the commissioner. Each licensee must have a copy of the Texas Credit Title and applicable regulations readily available.

(12) Retention and availability of records. All books and records required by this subsection must be available for inspection at any time by Office of Consumer Credit Commissioner staff, and must be retained for a period of four years from the date of the contract, or two years from the date of the final entry made thereon, whichever is later. Upon notification of an examination pursuant to Texas Finance Code, §348.514(f), the licensee must have the required books and records at the licensed location or registered office specified on the license. The records required by this subsection must be kept at an office in the state designated by the licensee except when the retail installment sales transactions are transferred under an agreement which gives the commissioner access to the documents. Documents may be maintained out of state if the licensee has in writing acknowledged responsibility for either making the records available within the state for examination or by acknowledging responsibility for additional examination costs associated with examinations conducted out of state.

(e) Litigation records. For a retail installment sales transaction involving legal action against the retail buyer, the following written or recorded records must be maintained, including:

(1) a copy of the original petition and the most current amended petition, if any;

(2) proof of judgment if a judgment is taken and amounts awarded by the court;

(3) copies of legal documents filed with a court of competent jurisdiction relating to writ of sequestration, hindering of secured creditor claim, or any other legal claim filed against the retail buyer;

(4) the date and terms of settlement if settlement is made between the retail buyer and the licensee before judgment.

(f) Repossession records. For a retail installment sales transaction involving the repossession of the vehicle, the following written or recorded records must be maintained, including:

(1) a condition report indicating the condition of the collateral;

(2) any invoices or receipts for any reasonable and authorized out-of-pocket expenses incurred in connection with the repossession or sequestration of the vehicle including cost of storing, reconditioning, and reselling the vehicle;

(3) for a vehicle disposed of in a public or private sale as permitted by the Texas Business and Commerce Code, §9.610, the following documents:

(A) one of the three following notices:

(i) for a transaction not involving consumer goods, a copy of any Notification of Disposition of Collateral letter sent to the retail buyer and other obligors as required by Texas Business and Commerce Code, §9.613;

(ii) for a transaction involving consumer goods, a copy of any Notice of Our Plan to Sell Property as sent to the retail buyer and other obligors as required by Texas Business and Commerce Code, §9.614; or

(iii) a copy of the waiver of the notice of intended disposition prescribed by clause (i) or (ii) of this subparagraph, as applicable, signed by the retail buyer and other obligors after default;

(B) copies of any evidence of a fair private sale or the commercial reasonableness of the private sale such as three bids or other documents relating to the disposition of the collateral in a private sale. The bids must include the name of the bidder, address of the bidder, and amount of the bid;

(C) copies of the auction receipts reflecting the commercial reasonableness of the sale if the vehicle's disposition is by a public sale or a dealer-only auction;

(D) the bill of sale showing the name and address of the purchaser of the repossessed collateral and the purchase price of the vehicle;

(E) for a disposition or sale of collateral creating a surplus balance, a copy of the check representing the payment of the surplus balance paid to the retail buyer or other obligors;

(F) for a disposition or sale of collateral resulting in a surplus or deficiency, a copy of the explanation of calculation of surplus or deficiency as required by Texas Business and Commerce Code, §9.616, if applicable;

(G) a copy of the waiver of the deficiency letter if the retail seller elects to waive the deficiency balance in lieu of sending the explanation of calculation of surplus or deficiency form;

(4) for a vehicle disposed of using the strict foreclosure method as permitted by the Texas Business and Commerce Code, §9.620 and §9.621, the following documents:

(A) one of the three following notices;

(i) for a transaction not involving consumer goods and where less than 60% of the cash price of the vehicle has been paid, a copy of the notice of proposal to accept collateral in full or partial satisfaction of the obligation;

(ii) for a transaction involving consumer goods, a copy of the notice of proposal to accept collateral in full satisfaction of the obligation; or

(iii) for a transaction where more than 60% of the cash price of the vehicle has been paid, a copy of the debtor or obligor's waiver of compulsory disposition of collateral signed by the retail buyers and other obligors after default;

(B) for a transaction where the retail buyer rejects the offer under subparagraph (A)(i) or (ii) of this paragraph, a copy of the retail buyer's signed objection to retention of the collateral;

(C) copies of the records reflecting the partial or total satisfaction of the obligation; and

(5) for a vehicle disposed by another authorized method pursuant to the Texas Business and Commerce Code, Chapter 9, a copy of any and all records or documents relating to the disposition of the collateral.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803225
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER D. POWERS OF CREDIT UNIONS

7 TAC §91.405

The Credit Union Commission proposes amendments to 7 TAC §91.405, concerning Records Retention and Preservation. The proposed amendments allow credit unions to choose the format for retaining records provided that the records are maintained in a sufficiently detailed and retrievable manner. The amendments eliminate the requirement that certain records be maintained permanently in their original form and delete the requirement that the credit union obtain a legal opinion on its method of retaining records. The amendments also make non-substantive edits to some of the language.

The amendments are proposed to update the permitted methods of record retention.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loar has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at the Commission's September Legislative Advisory Committee meeting at 914 East Anderson Lane, Austin, Texas 78752.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §123.110, concerning records.

The specific section affected by the proposed amended rule is Texas Finance Code, §123.110.

§91.405. Records Retention and Preservation.

(a) General. Every credit union shall [~~make and~~] keep [~~current accounts, books, and other~~] records of [~~all of~~] its transactions in sufficient detail to permit examination, audit and verification of financial statements, schedules, and reports it is required to file with the Department or which it issues to its members. Credit union [~~Such~~] accounts, books and other records shall be maintained in appropriate form and [~~in sufficient detail to provide all of the information with respect to the business of the credit union~~] for the [~~such~~] minimum periods [~~as~~] prescribed by this section. The retention period for each record starts from the last entry or final action date and not from the inception of the record.

(b) Manner of maintenance. Records [~~Except for those records described in subsection (c) of this section, records~~] may be maintained in whatever manner, [~~form~~] or format a credit union deems appropriate; provided, however, the records [~~required by this section~~] must clearly and accurately reflect the information required, provide an adequate basis for the examination and audit of the information, and [~~can~~] be retrievable easily and [~~retrieved~~] in a readable and useable format. [~~Records may be maintained in hard copy, automated or electronic form provided the records are easily retrievable, readily available for inspection, and capable of being reproduced in a hard copy.~~] A credit union may contract with third party service providers to maintain records required under this part.

(c) Permanent retention. It is recommended that the [~~The~~] following records [~~must~~] be retained permanently in their original form:

(1) charter, bylaws, articles of incorporation, and amendments thereto; and

(2) currently effective certificates or licenses to operate under programs of various government agencies, such as a certificate to act as issuing agent for the sale of United States savings bonds. [~~; and~~]

[~~(3) currently effective membership applications, joint membership agreements, payable on death agreements, share draft agreements, signature cards, and any other currently effective account agreements related to share or deposit accounts.~~]

[~~(4) A credit union board of directors may by policy elect to maintain these membership records in other than original form after obtaining a legal opinion that the proposed methodology continues all legal remedies as if the original has been retained.~~]

(d) - (k) (No change.)

(l) Reproduction of records. A credit union shall furnish promptly, at its own expense, legible, true and complete copies of any record required to be kept by this section as [~~are~~] requested by the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803247
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 837-9236

♦ ♦ ♦

PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 151. HOME EQUITY LENDING PROCEDURES

7 TAC §§151.1, 151.3, 151.7, 151.8

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") jointly propose amendments to interpretations 7 TAC §§151.1, 151.3, 151.7, and 151.8, relating to home equity lending procedures under Texas Constitution, Article XVI, §50(a)(6), (g), and (t)(3).

Texas Constitution, Article XVI, §50 ("Section 50"), sets out the only permissible encumbrances on a homestead. Pursuant to Section 50(u), as implemented by Texas Finance Code, §11.308 and §15.413, the power to interpret Section 50(a)(5) - (7), (e) - (p), and (t) of the Texas Constitution has been separately and independently delegated to the commissions, subject to the statutory admonition that the commissions strive for consistency in the exercise of this independent authority. The commissions have jointly adopted the home equity lending procedures codified in 7 TAC, Chapter 151.

In general, the purpose of the proposed amendments to §§151.1, 151.3, 151.7, and 151.8 is to implement technical corrections resulting from the commissions' review of Chapter 151. The individual purposes of the amendments to each section are provided in the following paragraphs.

The proposed amendment to §151.1 concerning Application for Interpretation serves to update the title of one of the joint financial regulatory agencies. The current title of "Department of Savings and Mortgage Lending" is proposed to replace the former "Savings and Loan Department."

The proposed amendments to §151.3 concerning Initiation of Interpretation Procedure provide consistency in a phrase used throughout the section. In subsections (d) and (e), the phrase "advance notice" is proposed to replace the past tense "advanced notice," in order to maintain consistency with existing subsection (c) and use of preferred grammar.

The proposed amendments to §151.7 concerning Adoption of Interpretation are also for consistency purposes. The first sentence and paragraph (1)(C) of §151.7 list actions being taken by the "Finance Commission and Credit Union Commission." Amendments to paragraphs (2) and (3) are proposed to continue use of that language to maintain parallel phrasing throughout the section.

The proposed amendments to §151.8 concerning Savings Clause and Severability provide clarity so that the rule will be easier to understand. Throughout the section, the phrase "this rule" is used. The commissions propose that "any interpretation adopted under Chapters 151, 152, and 153 of this title" replace "this rule" in all occurrences to reflect the most accurate wording. In addition, the word "that" is unnecessary and is proposed for deletion from the last sentence.

Leslie L. Pettijohn, Consumer Credit Commissioner, on behalf of the Finance Commission of Texas, and Harold Feeney, Credit Union Commissioner, on behalf of the Texas Credit Union Commission, have determined that for the first five-year period the amended interpretations are in effect there will be no fiscal implications for state or local government as a result of administering the interpretations.

Commissioner Pettijohn and Commissioner Feeney also have determined that for each year of the first five years the amended interpretations as proposed are in effect, the anticipated public benefit will be clarity and consistency of home equity lending procedures. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Written comments on the proposed amendments may be submitted to Sealy Hutchings, General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or to Betsy Loar, General Counsel, Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or by email to sealy.hutchings@occc.state.tx.us or to betsy.loar@tcud.state.tx.us. To be considered, a written comment must be received on or before the 30th day after the date the proposed amendments are published in the *Texas Register*. At the conclusion of the 30th day after the proposed amendments are published in the *Texas Register*, no further comments will be considered or accepted by the commissions.

The amended interpretations are proposed pursuant to Texas Finance Code, §11.308 and §15.413, which separately and independently authorize each commission to issue interpretations of the Texas Constitution, Article XVI, §§50(a)(5) - (7), (e) - (p), (t), and (u), subject to Texas Government Code, Chapter 2001.

The Texas Constitution, Article XVI, §50(a)(6), (g), and (t)(3) are affected by the proposed amendments.

§151.1. Application for Interpretation.

(a) (No change.)

(b) An interested person may submit a request for an interpretation of Section 50(a)(5) - (7), (e) - (p), and (t), Article XVI of the Texas Constitution. All requests must:

(1) be directed to the general counsel for the Office of Consumer Credit Commissioner who will promptly distribute it to the general counsels for the Department of Banking, the Department of Savings and Mortgage Lending [~~Savings and Loan Department~~], and the Credit Union Department;

(2) - (5) (No change.)

§151.3. Initiation of Interpretation Procedure.

(a) - (c) (No change.)

(d) The parties requesting advance [~~advanced~~] notice may provide their input indicating an opinion of how the legal issue should be resolved, the basis for that opinion, an analysis of any relevant court decisions and all prior interpretations to which the request relates.

(e) The input of the parties requesting advance [~~advanced~~] notice will be considered.

§151.7. Adoption of Interpretation.

The interpretation as finally adopted by the Finance Commission and Credit Union Commission, will include:

(1) (No change.)

(2) a concise restatement of the particular constitutional provisions under which the interpretation is adopted and of how the Finance Commission and Credit Union Commission interpret [~~agency interprets~~] the provisions as authorizing or requiring the interpretation; and

(3) a certification that the interpretation, as adopted, has been reviewed by legal counsel and found to be a valid exercise of

the Finance Commission's and Credit Union Commission's [~~agency's~~] legal authority.

§151.8. Savings Clause and Severability.

The Finance Commission and Credit Union Commission intend that each provision of any interpretation adopted under Chapters 151, 152, and 153 of this title [~~this rule~~] is consistent with Chapter 2001, Government Code. The provisions of any interpretation adopted under Chapters 151, 152, and 153 of this title [~~this rule~~] are severable. If any provision of any interpretation adopted under Chapters 151, 152, and 153 of this title [~~this rule~~] is determined to be inconsistent with Chapter 2001, Government Code or otherwise invalid, all valid provisions [~~that~~] are severable from the invalid part.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803221
Leslie L. Pettijohn
Consumer Credit Commissioner
Joint Financial Regulatory Agencies
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

CHAPTER 153. HOME EQUITY LENDING

7 TAC §§153.11 - 153.14, 153.51, 153.95

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") jointly propose amendments to interpretations 7 TAC §§153.11 - 153.14, 153.51, and 153.95 relating to home equity lending under Texas Constitution, Article XVI, §50(a)(6), (g), and (t)(3).

Texas Constitution, Article XVI, §50 ("Section 50"), sets out the only permissible encumbrances on a homestead. Pursuant to Section 50(u), as implemented by Texas Finance Code, §11.308 and §15.413, the power to interpret Section 50(a)(5) - (7), (e) - (p), and (t) of the Texas Constitution has been separately and independently delegated to the commissions, subject to the statutory admonition that the commissions strive for consistency in the exercise of this independent authority. The commissions have jointly adopted the home equity lending interpretations codified in 7 TAC, Chapter 153.

The purpose of the proposed amendments to §§153.11, 153.14, 153.51, and 153.95 is to implement changes resulting from the commissions' review of Chapter 153. The changes serve to provide clarification to both borrowers and lenders regarding certain aspects of home equity lending transactions. For the complete responses to the comments received by the commissions regarding the review of Chapter 153, please see the adopted rule review notice published separately in this issue of the *Texas Register*.

Section 50 was amended effective December 4, 2007, pursuant to voter approval of Proposition 8 (House Joint Resolution Number 72), proposed in the 80th Texas Legislative Session. The purpose of the proposed amendments to §153.12 and §153.13 is to conform with the constitutional changes in Section 50. The individual purposes of the amendments to each section are provided in the following paragraphs.

As a result of comments received in response to the review of Chapter 153, the proposed amendments to §153.11 clarify how to calculate the constitutional period of "two months" in relation to the repayment schedule. The commissions propose the addition of paragraph (1), which states: "The two month time period contained in Section 50(a)(6)(L)(i) begins on the date of closing." Second, the commissions also propose new paragraph (2), which provides that "a month is the period from a date in a month to the corresponding date in the succeeding month." Following this basic definition are two examples to address months with different numbers of days. In addition, the existing paragraphs have been renumbered accordingly.

The definition of "month" and corresponding examples track those provided under Texas Finance Code, Subtitle B, §341.002. While the majority of home equity loans are subject to Subtitle A of the Texas Finance Code, there are some home equity loans that do fall under Subtitle B. Thus, in order to avoid any inconsistency for those Subtitle B home equity loans, the commissions believe that use of the same principles found in §341.002 concerning the calculation of a month as contained in proposed §153.11(2) would be most appropriate.

In a separate but concurrent rule adoption published separately in this issue of the *Texas Register*, the commissions are amending §153.22 to clarify that one copy of documents required by Section 50(a)(6)(Q)(v) may be provided to married owners. The proposed amendment to §153.12 is a conforming change, proposing the addition of the same sentence being added to §153.22, as follows: "One copy of these documents may be provided to married owners."

The proposed amendments to §153.13 clarify several issues regarding preclosing disclosures. As a result of comments received on a previous proposal, the commissions have determined that the following revisions are more appropriately included in §153.13, as opposed to the originally proposed location in §153.51. The previously proposed amendments to §153.51 are being withdrawn. First, the lender's obligation to provide a copy of the application at least one business day prior to closing, if not previously provided, has been added as required by amended Section 50(a)(6)(M)(ii). Second, new paragraph (1) is proposed for addition in order to define "preclosing disclosure" as " a copy of the loan application, if not previously provided, and a copy of a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing." Third, the proposed addition of new paragraph (2) is intended to implement the following legislative intent, as stated by Representative Burt Solomons: "[O]ne day prior to closing, the lender is required to give the homeowner a copy of the loan application, and a final, itemized disclosure of all the actual fees, points, interest, costs, and charges that would be charged at closing. This copy of the loan application is the *most current version* that the borrower reviews for accuracy before the closing. " H.J. OF TEX., 80th Leg., R.S. 2431-32 (2007) (emphasis added). Thus, proposed new §153.13(2) states: "The copy of the loan application submitted to the owner in satisfaction of the preclosing disclosure requirement must be the most current version at the time the document is delivered."

The fourth revision to §153.13 proposes amendments to paragraph (3) (former paragraph (1)) which serve to clarify that by providing a properly completed Form HUD-1 or HUD-1A, a lender may satisfy the disclosure requirement of providing a copy of the final itemized disclosure. Thus, the lender is still required to provide a copy of the loan application, if not

previously provided. And finally, the existing paragraphs have been renumbered accordingly.

The proposed amendments to §153.14 serve to clarify issues regarding modifications and the 3% fee cap in response to comments received on the rule review. First, the commissions believe that any modification of a home equity loan must still follow all constitutional home equity provisions. For example, a modification with new terms should result in substantially equal payments. Thus, the commissions propose the addition of the following instructive sentences to §153.14(2): "A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction." In addition, in order to avoid any confusion, after "A modification" in the second sentence, the clarifying phrase "of a home equity loan occurs when" is proposed to replace the phrase "is a transaction in which."

Also with regard to §153.14, the commissions believe that a modified home equity loan is still the same loan, same transaction, and that one 3% fee cap should apply to both the original loan and any modification. Accordingly, the commissions propose the addition of new subparagraph (D) to §153.14(2) as follows: "The 3% fee cap required by Section 50(a)(6)(E) applies to the original home equity loan and any subsequent modification as a single transaction."

As suggested by a commenter during the review of Chapter 153, the proposed amendment to §153.51 adds a new subparagraph 4 dealing with the Spanish translation of the consumer notice. The commissions believe that adding a reference to permissible reliance on the Spanish translation of the consumer notice, as developed under Texas Finance Code, §341.502, would be helpful to lenders. Therefore, the commissions propose the addition of §153.51(4) as follows: "A lender whose discussions with the borrower are conducted primarily in Spanish may rely on the translation of the consumer notice developed under the requirements of Texas Finance Code, §341.502. Such notice shall be made available to the public through publication on the Finance Commission's webpage."

The purpose of the proposed amendments to §153.95 is to implement technical corrections discovered during the rule review process. In subsections (a) and (b), revisions are proposed to reflect the appropriate constitutional citations related to curing a violation.

Leslie L. Pettijohn, Consumer Credit Commissioner, on behalf of the Finance Commission of Texas, and Harold Feeney, Credit Union Commissioner, on behalf of the Texas Credit Union Commission, have determined that for the first five-year period the amended interpretations are in effect there will be no fiscal implications for state or local government as a result of administering the interpretations.

Commissioner Pettijohn and Commissioner Feeney also have determined that for each year of the first five years the amended interpretations as proposed are in effect, the anticipated public benefit will be implementation of and consistency with the Texas Constitution. Stability of the credit markets is enhanced through the creation of reliable standards and guidelines for home equity loans. Further, this stability will benefit consumers by ensuring that home equity loans are as widely available to Texas homeowners as possible. Finally, availability, certainty, and the resulting enhancement of competition will contribute to reducing the overall transaction cost to lenders and consumers with respect to home equity loans.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses. Any requirements are imposed by the Texas Constitution and are not a result of the proposed amendments to the interpretations. The proposed amendments therefore do not impose any additional costs to persons who are required to comply with the interpretations.

Written comments on the proposed amendments may be submitted to Sealy Hutchings, General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or to Betsy Loar, General Counsel, Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or by email to sealy.hutchings@occc.state.tx.us or to betsy.loar@tcud.state.tx.us. To be considered, a written comment must be received on or before the 30th day after the date the proposed amendments are published in the *Texas Register*. At the conclusion of the 30th day after the proposed amendments are published in the *Texas Register*, no further comments will be considered or accepted by the commissions.

The amended interpretations are proposed pursuant to Texas Finance Code, §11.308 and §15.413, which separately and independently authorize each commission to issue interpretations of the Texas Constitution, Article XVI, §§50(a)(5) - (7), (e) - (p), (t), and (u), subject to Texas Government Code, Chapter 2001.

The Texas Constitution, Article XVI, §50(a)(6), (g), and (t)(3) are affected by the proposed amendments.

§153.11. Repayment Schedule: Section 50(a)(6)(L)(i).

Unless an equity loan is a home equity line of credit under Section 50(a)(6)(t), the loan must be scheduled to be repaid in substantially equal successive periodic installments, not more often than every 14 days and not less often than monthly, beginning no later than two months from the date the extension of credit is made, each of which equals or exceeds the amount of accrued interest as of the date of the scheduled installment.

(1) The two month time period contained in Section 50(a)(6)(L)(i) begins on the date of closing.

(2) For purposes of Section 50(a)(6)(L)(i), a month is the period from a date in a month to the corresponding date in the succeeding month. For example, if a home equity loan closes on March 1, the first installment must be due no later than May 1. If the succeeding month does not have a corresponding date, the period ends on the last day of the succeeding month. For example, if a home equity loan closes on July 31, the first installment must be due no later than September 30.

(3) [~~(1)~~] For a closed-end equity loan to have substantially equal successive periodic installments, some amount of principal must be reduced with each installment. This requirement prohibits balloon payments.

(4) [~~(2)~~] Section 50(a)(6)(L)(i) does not preclude a lender's recovery of payments as necessary for other amounts such as taxes, adverse liens, insurance premiums, collection costs, and similar items.

§153.12. Closing Date: Section 50(a)(6)(M)(i).

An equity loan may not be closed before the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure. One copy of these documents may be

provided to married owners. For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the date the lender provides the owner a copy of the required consumer disclosure is the first day of the 12-day waiting period. The equity loan may be closed at any time on or after the 12th calendar day after the date the consumer disclosure is provided to the owner.

(1) - (2) (No change.)

§153.13. Preclosing Disclosures: Section 50(a)(6)(M)(ii).

An equity loan may not be closed before one business day after the date that the owner of the homestead receives a copy of the loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the date of closing.

(1) For purposes of this section, the "preclosing disclosure" consists of a copy of the loan application, if not previously provided, and a copy of a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing.

(2) The copy of the loan application submitted to the owner in satisfaction of the preclosing disclosure requirement must be the most current version at the time the document is delivered.

(3) [~~(1)~~] A lender may satisfy the disclosure requirement of providing a copy of a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing [~~this section~~] by delivery to the borrower of a properly completed Department of Housing and Urban Development (HUD) disclosure Form HUD-1 or HUD-1A.

(4) [~~(2)~~] Bona fide emergency.

(A) An owner may consent to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing in the case of a bona fide emergency occurring before the date of the extension of credit. An equity loan secured by a homestead in an area designated by Federal Emergency Management Agency (FEMA) as a disaster area is an example of a bona fide emergency if the homestead was damaged during FEMA's declared incident period.

(B) To document a bona fide emergency modification, the lender should obtain a written statement from the owner that:

(i) describes the emergency;

(ii) specifically states that the owner consents to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing;

(iii) bears the signature of all of the owners entitled to receive the preclosing disclosure; and

(iv) affirms the owner has received notice of the owner's right to receive a final itemized disclosure containing all actual fees, points, costs, and charges one day prior to closing.

(5) [~~(3)~~] Good cause. An owner may consent to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing if another good cause exists.

(A) Good cause to modify the preclosing disclosure or to receive a subsequent disclosure modifying the preclosing disclosure on the date of closing may only be established by the owner.

(i) The term "good cause" as used in this section means a legitimate or justifiable reason, such as financial impact or an adverse consequence.

(ii) At the owner's election, a good cause to modify the preclosing disclosure may be established if:

(I) the modification does not create a material adverse financial consequence to the owner; or

(II) a delay in the closing would create an adverse consequence to the owner.

(iii) The term "de minimis" as used in this section means a very small or insignificant amount.

(B) At the owner's election, a de minimis good cause standard may be presumed if:

(i) the total actual disclosed fees, costs, points, and charges on the date of closing do not exceed in the aggregate more than the greater of $100 or 0.125 percent of the principal amount of the loan (e.g. 0.125 percent on a $80,000 principal loan amount equals $100) from the initial preclosing disclosure; and

(ii) no itemized fee, cost, point, or charge exceeds more than the greater of $100 or 0.125 percent of the principal amount of the loan than the amount disclosed in the initial preclosing disclosure.

(C) To document a good cause modification of the disclosure, the lender should obtain a written statement from the owner that:

(i) describes the good cause;

(ii) specifically states that the owner consents to receive the preclosing disclosure on the date of closing;

(iii) bears the signature of all of the owners entitled to receive the preclosing disclosure; and

(iv) affirms the owner has received notice of the owner's right to receive a final itemized disclosure containing all fees, costs, points, or charges one day prior to closing.

(6) [~~(4)~~] An equity loan may be closed at any time during normal business hours on the next business day following the calendar day on which the owner receives the preclosing disclosure or any calendar day thereafter.

(7) [~~(5)~~] The owner maintains the right of rescission under Section 50(a)(6)(Q)(viii) even if the owner exercises an emergency or good cause modification of the preclosing disclosure.

§153.14. One Year Prohibition: Section 50(a)(6)(M)(iii).

An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property. An equity loan may be refinanced any time after the first anniversary of the loan's closing date.

(1) (No change.)

(2) Section 50(a)(6)(M)(iii) does not prohibit modification of an equity loan before one year has elapsed since the loan's closing date. A modification of a home equity loan occurs when [~~is a transaction in which~~] one or more terms of an existing equity loan is modified, but the note is not satisfied and replaced. A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction.

(A) - (C) (No change.)

(D) The 3% fee cap required by Section 50(a)(6)(E) applies to the original home equity loan and any subsequent modification as a single transaction.

§153.51. Consumer Disclosure: Section 50(g).

An equity loan may not be closed before the 12th day after the lender provides the owner with the consumer disclosure on a separate instrument.

(1) - (3) (No change.)

(4) A lender whose discussions with the borrower are conducted primarily in Spanish may rely on the translation of the consumer notice developed under the requirements of Texas Finance Code, §341.502. Such notice shall be made available to the public through publication on the Finance Commission's webpage.

§153.95. Cure a Violation Under Section 50(a)(6)(Q)(x).

(a) If the lender or holder timely corrects a violation of Section 50(a)(6) [~~Section 50(a)(6)(Q)(x)~~] as provided in Section 50(a)(6)(Q)(x), then the violation does not invalidate the lien.

(b) A lender or holder who complies with Section 50(a)(6)(Q)(x) to cure a violation [~~Section 50(a)(6)(Q)(x)~~] before receiving notice of the violation from the borrower receives the same protection as if the lender had timely cured after receiving notice.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803223
Leslie L. Pettijohn
Consumer Credit Commissioner
Joint Financial Regulatory Agencies
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS

SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §1.5

The Texas Board of Architectural Examiners proposes an amendment to §1.5 of Chapter 1, Subchapter A, pertaining to defined terms. The amendment adds definitions of the terms "cancellation" and "revocation" as those terms are used in the rules regulating the practice of architecture. The purpose of the amendment is to clarify the rules relating to the termination of an architect's certificate of registration. The amendment also serves to draw a distinction between the cancellation and the revocation of a certificate of registration. The definition of the term "cancellation" conforms the rules to Texas Occupations Code §1051.353 which specifies that an expired certificate of registration is cancelled a specified period of time after it has expired. If the amendment is adopted, the anticipated result would be improved guidance for those who consult the rules. The amendment also revises the definition of the term "reinstatement" to clarify that a cancelled certificate of registration may not be reinstated. The amendment implements Texas Occupations Code Annotated §1051.353 which provides that a certificate cancelled by operation of law cannot be renewed but must be replaced with a new license obtained through the standard licensure process. The amendment is intended to clarify the rules to provide notice that a certificate of registration cancelled by operation of law can not be revived.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications to state or local government.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: The rules relating to the practice of architecture will provide clearer guidance regarding the status of a terminated architectural certificate of registration. The amendment also serves to more explicitly implement statutes which provide for the cancellation of a certificate of registration by operation of law. The amended rule will have no impact on small or micro business.

There will be no change in the cost to persons required to comply with the section. The amendment clarifies and implements pre-existing law regarding the termination of a certificate of registration and the circumstances under which it may be reinstated. The amendment does not impose any additional regulatory burden upon businesses or individuals. Therefore, no economic impact statement or flexibility analysis of these amendments is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment to this rule is proposed pursuant to §1051.202 and §1051.353, Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners with authority to promulgate rules necessary to enforce laws within the agency's jurisdiction and specify the procedures for renewal of a certificate of registration.

The proposed amendment to this rule does not affect any other statutes.

§1.5. Terms Defined Herein.

The following words, terms, and acronyms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) The Act--The Architects' Registration Law.

(2) Actual Signature--A personal signature of the individual whose name is signed or an authorized copy of such signature.

(3) Administrative Procedure Act (APA)--Texas Government Code §§2001.001 et seq.

(4) APA--Administrative Procedure Act.

(5) Applicant--An individual who has submitted an application for registration or reinstatement but has not yet completed the registration or reinstatement process.

(6) Architect--An individual who holds a valid Texas architectural registration certificate granted by the Board.

(7) Architect Registration Examination (ARE)--The standardized test that a Candidate must pass in order to obtain a valid Texas architectural registration certificate.

(8) Architect Registration Examination Financial Assistance Fund (AREFAF)--A program administered by the Board

which provides monetary awards to Candidates and newly registered Architects who meet the program's criteria.

(9) Architects' Registration Law--Article 249a, Vernon's Texas Civil Statutes, and Chapter 1051, Texas Occupations Code.

(10) Architectural Barriers Act--Article 9102, Vernon's Texas Civil Statutes and Texas Government Code, Chapter 469.

(11) Architectural Intern--An individual enrolled in the Intern Development Program (IDP).

(12) ARE--Architect Registration Examination.

(13) AREFAF--Architect Registration Examination Financial Assistance Fund.

(14) Authorship--The state of having personally created something.

(15) Barrier-Free Design--The design of a building or a facility or the design of an alteration of a building or a facility which complies with the Texas Accessibility Standards, the Americans with Disabilities Act, the Fair Housing Accessibility Guidelines, or similarly accepted standards for accessible design.

(16) Board--Texas Board of Architectural Examiners.

(17) Cancel, Cancellation, or Cancelled--The termination of a Texas architectural registration certificate by operation of law two years after it expires without renewal by the certificate-holder.

(18) [~~(17)~~] Candidate--An Applicant approved by the Board to take the ARE.

(19) [~~(18)~~] CEPH--Continuing Education Program Hour(s).

(20) [~~(19)~~] Chair--The member of the Board who serves as the Board's presiding officer.

(21) [~~(20)~~] Construction Documents--Drawings; specifications; and addenda, change orders, construction change directives, and other Supplemental Documents issued by an Architect for the purpose(s) of Regulatory Approval, permitting, or construction.

(22) [~~(21)~~] Consultant--An individual retained by an Architect who prepares or assists in the preparation of technical design documents issued by the Architect for use in connection with the Architect's Construction Documents.

(23) [~~(22)~~] Contested Case--A proceeding, including a licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

(24) [~~(23)~~] Continuing Education Program Hour (CEPH)--At least fifty (50) minutes of time spent in an activity meeting the Board's continuing education requirements.

(25) [~~(24)~~] Council Certification--Certification granted by NCARB to architects who have satisfied certain standards related to architectural education, training, and examination.

(26) [~~(25)~~] Delinquent--A registration status signifying that an Architect

(A) has failed to remit the applicable renewal fee to the Board and

(B) is no longer authorized to Practice Architecture in Texas or use any of the terms restricted by the Architects' Registration Law.

(27) [~~(26)~~] Direct Supervision--The amount of oversight by an individual overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(28) [~~(27)~~] E-mail Directory--A listing of e-mail addresses

(A) used to advertise architectural services and

(B) posted on the Internet under circumstances where the Architects included in the list have control over the information included in the list.

(29) [~~(28)~~] Emeritus Architect (or Architect Emeritus)--An honorary title that may be used by an Architect who has retired from the Practice of Architecture in Texas pursuant to Texas Occupations Code, §1051.357.

(30) [~~(29)~~] Energy-Efficient Design--The design of a project and the specification of materials to minimize the consumption of energy in the use of the project. The term includes energy efficiency strategies by design as well as the incorporation of alternative energy systems.

(31) [~~(30)~~] Feasibility Study--A report of a detailed investigation and analysis conducted to determine the advisability of a proposed architectural project from a technical architectural standpoint.

(32) [~~(31)~~] Good Standing--

(A) a registration status signifying that an Architect is not delinquent in the payment of any fees owed to the Board or

(B) an application status signifying that an Applicant or Candidate is not delinquent in the payment of any fees owed to the Board, is not the subject of a pending TBAE enforcement proceeding, and has not been the subject of formal disciplinary action by an architectural registration board that would provide a ground for the denial of the application for architectural registration in Texas.

(33) [~~(32)~~] Governmental Entity--A Texas state agency or department; a district, authority, county, municipality, or other political subdivision of Texas; or a publicly owned Texas utility.

(34) [~~(33)~~] Governmental Jurisdiction--A governmental authority such as a state, territory, or country beyond the boundaries of Texas.

(35) [~~(34)~~] IDP--The Intern Development Program as administered by NCARB.

(36) [~~(35)~~] Inactive--A registration status signifying that an Architect may not Practice Architecture in the State of Texas.

(37) [~~(36)~~] Intern Development Program (IDP)--A comprehensive internship program established, interpreted, and enforced by NCARB.

(38) [~~(37)~~] Intern Development Training Requirement--Architectural experience necessary for an Applicant to obtain architectural registration by examination in Texas.

(39) [~~(38)~~] Institutional Residential Facility--A building intended for occupancy on a 24-hour basis by persons who are receiving custodial care from the proprietors or operators of the building. Hospitals, dormitories, nursing homes and other assisted living facilities, and correctional facilities are examples of buildings that may be Institutional Residential Facilities.

(40) [~~(39)~~] Licensed--Registered.

(41) [~~(40)~~] Member Board--An architectural registration board that is part of the nonprofit federation of architectural registration boards known as NCARB.

(42) [~~(41)~~] NAAB--National Architectural Accrediting Board.

(43) [~~(42)~~] National Architectural Accrediting Board (NAAB)--An agency that accredits architectural degree programs in the United States.

(44) [~~(43)~~] National Council of Architectural Registration Boards (NCARB)--A nonprofit federation of architectural registration boards from fifty-five (55) states and territories of the United States.

(45) [~~(44)~~] NCARB--National Council of Architectural Registration Boards.

(46) [~~(45)~~] Nonregistrant--An individual who is not an Architect.

(47) [~~(46)~~] Practice Architecture--Perform or do or offer or attempt to do or perform any service, work, act, or thing within the scope of the Practice of Architecture.

(48) [~~(47)~~] Practicing Architecture--Performing or doing or offering or attempting to do or perform any service, work, act, or thing within the scope of the Practice of Architecture.

(49) [~~(48)~~] Practice of Architecture--A service or creative work applying the art and science of developing design concepts, planning for functional relationships and intended uses, and establishing the form, appearance, aesthetics, and construction details for the construction, enlargement, or alteration of a building or environs intended for human use or occupancy, the proper application of which requires education, training, and experience in those matters.

(A) The term includes:

(i) establishing and documenting the form, aesthetics, materials, and construction technology for a building, group of buildings, or environs intended to be constructed or altered;

(ii) preparing or supervising and controlling the preparation of the architectural plans and specifications that include all integrated building systems and construction details, unless otherwise permitted under Texas Occupations Code, §1051.606(a)(4); and

(iii) observing the construction, modification, or alteration of work to evaluate conformance with architectural plans and specifications described in clause (ii) of this subparagraph for any building, group of buildings, or environs requiring an architect.

(B) The term "practice of architecture" also includes the following activities which, pursuant to Texas Occupations Code §1051.701(a), may be performed by a person who is not registered as an Architect:

(i) programming for construction projects, including identification of economic, legal, and natural constraints and determination of the scope and spatial relationship of functional elements;

(ii) recommending and overseeing appropriate construction project delivery systems;

(iii) consulting, investigating, and analyzing the design, form, aesthetics, materials, and construction technology used for the construction, enlargement, or alteration of a building or environs and providing expert opinion and testimony as necessary;

(iv) research to expand the knowledge base of the profession of architecture, including publishing or presenting findings in professional forums; and

(v) teaching, administering, and developing pedagogical theory in academic settings offering architectural education.

(50) [~~(49)~~] Principal--An architect who is responsible, either alone or with other architects, for an organization's Practice of Architecture.

(51) [~~(50)~~] Prototypical--From or of an architectural design intentionally created not only to establish the architectural parameters of a building or facility to be constructed but also to serve as a functional model on which future variations of the basic architectural design would be based for use in additional locations.

(52) [~~(51)~~] Public Entity--A state, a city, a county, a city and county, a district, a department or agency of state or local government which has official or quasi-official status, an agency established by state or local government though not a department thereof but subject to some governmental control, or any other political subdivision or public corporation.

(53) [~~(52)~~] Registered--Licensed.

(54) [~~(53)~~] Registrant--Architect.

(55) [~~(54)~~] Regulatory Approval--The approval of Construction Documents by the applicable Governmental Entity after a review of the architectural content of the Construction Documents as a prerequisite to construction or occupation of a building or a facility.

(56) [~~(55)~~] Reinstatement--The procedure through which a [~~cancelled,~~] Surrendered[~~,~~] or revoked Texas architectural registration certificate is restored.

(57) [~~(56)~~] Renewal--The procedure through which an Architect pays a periodic fee so that the Architect's registration certificate will continue to be effective.

(58) [~~(57)~~] Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered architects applying the applicable architectural standard of care.

(59) Revocation or Revoked--The termination of an architectural registration certificate by the Board.

(60) [~~(58)~~] Rules and Regulations of the Board--22 Texas Administrative Code §§1.1 et seq.

(61) [~~(59)~~] Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(62) [~~(60)~~] Secretary-Treasurer--The member of the Board responsible for signing the official copy of the minutes of each Board meeting and maintaining the record of Board members' attendance at Board meetings.

(63) [~~(61)~~] SOAH--State Office of Administrative Hearings.

(64) [~~(62)~~] State Office of Administrative Hearings (SOAH)--A Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings involving the executive branch of Texas government.

(65) [~~(63)~~] Supervision and Control--The amount of oversight by an architect overseeing the work of another whereby

(A) the architect and the individual performing the work can document frequent and detailed communication with one another and the architect has both control over and detailed professional knowledge of the work; or

(B) the architect is in Responsible Charge of the work and the individual performing the work is employed by the architect or by the architect's employer.

(66) [~~(64)~~] Supplemental Document--A document that modifies or adds to the technical architectural content of an existing Construction Document.

(67) [~~(65)~~] Surrender--The act of relinquishing a Texas architectural registration certificate along with all privileges associated with the certificate.

(68) [~~(66)~~] Sustainable Design--An integrative approach to the process of design which seeks to avoid depletion of energy, water, and raw material resources; prevent environmental degradation caused by facility and infrastructure developments during their implementation and over their life cycle; and create environments that are livable and promote health, safety and well-being. Sustainability is the concept of meeting present needs without compromising the ability of future generations to meet their own needs.

(69) [~~(67)~~] TBAE--Texas Board of Architectural Examiners.

(70) [~~(68)~~] TDLR--Texas Department of Licensing and Regulation.

(71) [~~(69)~~] Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(72) [~~(70)~~] Texas Guaranteed Student Loan Corporation (TGSLC)--A public, nonprofit corporation that administers the Federal Family Education Loan Program.

(73) [~~(71)~~] TGSLC--Texas Guaranteed Student Loan Corporation.

(74) [~~(72)~~] Vice-Chair--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chair, serves as the Board's presiding officer. If necessary, the Vice-Chair succeeds the Chair until a new Chair is appointed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803229
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER D. CERTIFICATION AND ANNUAL REGISTRATION

22 TAC §1.65, §1.66

The Texas Board of Architectural Examiners proposes an amendment to §1.65 and §1.66 of Chapter 1, Subchapter D, pertaining to the annual renewal process and reinstatement. The amendment modifies a provision regarding the issuance of a new certificate of registration to a person after his or her previous registration had been cancelled by operation of law. The current rule allows a person from another jurisdiction to receive a new certificate of registration through a reciprocity agreement with the other jurisdiction if the person meets all requirements for reciprocal registration "including the completion a registration examination." The requirements for reciprocal registration specify that a person licensed in another jurisdiction must have become licensed under substantially equivalent licensure requirements applicable in Texas, including examination. Requiring licensees from other jurisdictions to complete the examination again is contrary to the intent of reciprocity agreement and may impede Texas registrants from gaining registration in other jurisdictions. Therefore, the amendment strikes the reference to completing the registration examination from the reciprocity provision. The amendment to §1.66 provides notice that the Board is not permitted to reinstate a certificate of registration that is cancelled by operation of law two years after it expires. The amendment provides for disciplinary action against a person for practicing or using a title unlawfully during a period in which the person's certificate of registration has been expired. The amendment also changes the rule to allow the Board the discretion, under certain circumstances, to reinstate a certificate of registration that has been revoked or surrendered for a period of 5 years or longer. Currently, the rule prohibits the reinstatement of a certificate of registration if it has been revoked, cancelled or surrendered for 5 years or longer. As amended, the Board would have the discretion to reinstate the certificate subject to the same conditions and limitations that may apply to a probated suspension of a certificate of registration. The amendments would eliminate the use of the term "cancelled" in two different contexts to remove a confusing aspect of the current rule. The amendments would clarify that the Board is unable under law to reinstate a certificate of registration that has been cancelled by operation of law and allows the Board greater discretion to reinstate a certificate of registration that was terminated under circumstances other than cancellation by operation of law.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there would be no fiscal impact on state and local government.

Ms. Hendricks has also determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rules are as follows: eliminating the examination requirement for a person licensed in another jurisdiction will remove a potential obstacle for Texas registrants who seek registration in other jurisdictions. Since licensees in other jurisdictions and registrants in Texas must pass an examination to obtain licensure, the amendment would allow greater access to licensure and allow consumers greater options for services without diminishing the protection of the public health, safety and welfare. The amendments will also allow a person whose registration has been revoked or surrendered for five years or longer an opportunity to reinstate registration, subject to conditions imposed by the Board to protect the public from potential risks from incompetent practices. Finally, the amendments will benefit the public by replacing a relatively obscure provision with a prominent notice that the Board does not have the discretion under law to reinstate a cancelled certificate of registration. The amended rules will have no adverse impact on small or micro business. Therefore, no economic impact statement or flexibility analysis of these amendments is required.

There will be no change in the cost to persons required to comply with the sections.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendments to these rules are proposed pursuant to §§1051.202, 1051.305, and 1051.353(d) of Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners the authority to promulgate rules, including rules related to registration, and which allow the Board the authority to waive any prerequisite for registration for an out-of-state registrant from a jurisdiction which has substantially equivalent licensing requirements and a reciprocity agreement with Texas and which provide that a person whose registration has been cancelled by operation of law may obtain a new certificate of registration by complying with the requirements and procedures for obtaining an original certificate, which would include procedures for obtaining an original certificate through reciprocity.

The proposed amendments to these rules do not affect any other statutes.

§1.65. Annual Renewal Procedure.

(a) - (f) (No change.)

(g) If a registration is not renewed within 2 years after the specified registration expiration date, the registration shall be cancelled by operation of law on the two-year anniversary of its expiration without an opportunity for a formal hearing. If a registration is cancelled pursuant to this subsection, the registration may not be reinstated. In order to obtain a new certificate of registration, a person whose registration was cancelled pursuant to this subsection must:

(1) submit an application for registration and satisfy all requirements for registration pursuant to §1.21 of this title (relating to Registration by Examination) [~~Section 1.21~~], including the successful completion of the registration examination;

(2) submit an application for registration by reciprocal transfer and satisfy all requirements for registration by reciprocal transfer pursuant to §1.22 of this title (relating to Registration by Reciprocal Transfer) [~~Section 1.22, including the successful completion of the registration examination~~]; or

(3) submit an application for registration and demonstrate that he/she moved to another state and is currently licensed or registered and has been in practice in the other state for at least the 2 years immediately preceding the date of the application.

§1.66. Reinstatement.

(a) Once the revocation[~~, cancellation,~~] or Surrender [~~surrender~~] of an Architect's registration is effective, the registration may be reinstated only after an application for reinstatement is properly submitted and approved and the prescribed reinstatement fee is paid. THE BOARD IS NOT PERMITTED TO REINSTATE A CERTIFICATE OF REGISTRATION WHICH IS CANCELLED BY OPERATION OF LAW DUE TO THE REGISTRANT'S FAILURE TO RENEW THE REGISTRATION WITHIN 2 YEARS AFTER ITS DESIGNATED EXPIRATION DATE.

(b) If a reinstatement Applicant has practiced architecture unlawfully or used any form of the title "architect" in violation of the Architects' Registration Law since the effective date of the expiration of the Applicant's revoked registration [~~revocation, cancellation,~~] or the Surrender [~~surrender~~] of the Applicant's registration, the reinstatement fee to be paid upon approval of the application shall include an amount equal to the sum of the registration renewal fees for each year since the effective date of the expiration [~~revocation, cancellation,~~] or Surrender. [~~surrender.~~]

(c) An application for reinstatement may be denied on the following grounds:

[~~(1) the registration has been revoked for a continuous period of five (5) years or longer;~~]

(1) [~~(2)~~] the reinstatement Applicant has performed an act, omitted an act or allowed an omission, or otherwise engaged in a practice that could serve as the basis for the rejection of an application for registration or for the revocation of a registration; or

(2) [~~(3)~~] the registration was voluntarily Surrendered [~~surrendered~~] in lieu of potential disciplinary action and the Board finds that the approval of the reinstatement application does not appear to be in the public's interest.

(d) If at least five (5) years have passed since the effective date of the revocation[~~, cancellation,~~] or Surrender [~~surrender~~] of a registration, the Board may reinstate the registration fully or subject to a probated suspension under any of the terms and conditions listed in §1.234(c) of this title (relating to Suspension of Registration). In order for the Board to approve an application for reinstatement of a registration which has been revoked or Surrendered for five (5) years or longer, an Applicant shall file [~~one of~~] the following with the [~~shall be required prior to approval of an~~] application for reinstatement:

(1) proof of successful completion of all sections of the current registration examination during the five (5) years immediately preceding reinstatement; [~~or~~]

(2) proof [~~verification~~] that the Applicant currently holds an architectural registration that is active and in good standing in another jurisdiction where the registration requirements are substantially equivalent to Texas architectural registration requirements; or[~~.~~]

(3) An affidavit of one or more Architects attesting that the Applicant has satisfactorily engaged in the Practice of Architecture under the Supervision and Control of the Architect(s) since the effective date of the expiration or Surrender of the Applicant's registration, and proof that the Applicant has fulfilled the continuing education requirements the Applicant would have been required to fulfill as a Registrant during each year since the effective date of the revocation or Surrender of the Applicant's registration.

(e) If a registration was revoked as a result of disciplinary action or Surrendered [~~surrendered~~] in lieu of disciplinary action, the registration shall not be reinstated unless the Applicant:

(1) demonstrates that the Applicant has taken reasonable steps to correct the misconduct or deficiency that led to the revocation or Surrender; [~~surrender;~~]

(2) demonstrates that approval of the application is not inconsistent with the Board's duty to protect the public by ensuring that registrants are duly qualified and fit for registration; and

(3) pays all fees and costs incurred by the Board as a result of any proceeding that led to the revocation or Surrender. [~~surrender.~~]

[~~(f) If a registration is cancelled by operation of law due to the Registrant's failure to renew the registration within 2 years after its designated expiration date, the registration may not be reinstated.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803230

Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

CHAPTER 3. LANDSCAPE ARCHITECTS
SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §3.5

The Texas Board of Architectural Examiners proposes an amendment to §3.5 of Chapter 3, Subchapter A, pertaining to defined terms. The amendment adds definitions of the terms "cancellation" and "revocation" as those terms are used in the rules regulating the practice of landscape architecture. The purpose of the amendment is to clarify the rules relating to the termination of a landscape architect's license. The amendment also serves to draw a distinction between the cancellation and the revocation of a license. The definition of the term "cancellation" conforms the rules to Texas Occupations Code §1051.353 which specifies that an expired license is cancelled 2 years after it expires. If the amendment is adopted, the anticipated result would be to provide greater guidance for those who consult the rules. The amendment also revises the definition of the term "reinstatement" to clarify that a cancelled license may not be reinstated. The amendment implements Texas Occupations Code Annotated §1051.353 which provides that a license cancelled by operation of law cannot be renewed but must be replaced with a new license obtained through the standard licensure process. The amendment is intended to clarify the rules to provide notice that a license cancelled by operation of law can not be revived.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications to state or local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: The rules relating to the practice of landscape architecture will provide clearer guidance regarding the status of a terminated landscape architectural certificate of registration. The amendment also serves to more explicitly implement statutes which provide for the cancellation of a certificate of registration by operation of law. The amended rule will have no impact on small or micro business.

There will be no change in the cost to persons required to comply with the section. The amendment clarifies and implements pre-existing law regarding the termination of a license and the circumstances under which it may be reinstated. The amendment does not impose any additional regulatory burden upon businesses or individuals. Therefore, no economic impact statement or flexibility analysis of these amendments is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment to this rule is proposed pursuant to §1051.202 and §1051.353, Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners with authority to promulgate rules necessary to enforce laws within the agency's jurisdiction and specify the procedures for renewal of a license.

The proposed amendment to this rule does not affect any other statutes.

§3.5. Terms Defined Herein.

The following words, terms, and acronyms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) The Act--The Landscape Architects' Registration Law.

(2) Actual Signature--A personal signature of the individual whose name is signed or an authorized copy of such signature.

(3) Administrative Procedure Act (APA)--Texas Government Code §§2001.001 et seq.

(4) APA--Administrative Procedure Act.

(5) Applicant--An individual who has submitted an application for registration or reinstatement but has not yet completed the registration or reinstatement process.

(6) Architectural Barriers Act--Article 9102, Vernon's Texas Civil Statutes and Texas Government Code, Chapter 469.

(7) Authorship--The state of having personally created something.

(8) Barrier-Free Design--The design of a facility or the design of an alteration of a facility which complies with the Texas Accessibility Standards, the Americans with Disabilities Act, the Fair Housing Accessibility Guidelines, or similarly accepted standards for accessible design.

(9) Board--Texas Board of Architectural Examiners.

(10) Cancel, Cancellation, or Cancelled--The termination of a Texas landscape architectural registration certificate by operation of law two years after it expires without renewal by the certificate-holder.

(11) [~~(10)~~] Candidate--An Applicant approved by the Board to take the LARE.

(12) [~~(11)~~] CEPH--Continuing Education Program Hour(s).

(13) [~~(12)~~] Chair--The member of the Board who serves as the Board's presiding officer.

(14) [~~(13)~~] CLARB--Council of Landscape Architectural Registration Boards.

(15) [~~(14)~~] Construction Documents--Drawings; specifications; and addenda, change orders, construction change directives, and other Supplemental Documents issued by a Landscape Architect for the purpose(s) of Regulatory Approval, permitting, or construction.

(16) [~~(15)~~] Consultant--An individual retained by a Landscape Architect who prepares or assists in the preparation of technical design documents issued by the Landscape Architect for use in connection with the Landscape Architect's Construction Documents.

(17) [~~(16)~~] Contested Case--A proceeding, including a licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

(18) [~~(17)~~] Continuing Education Program Hour (CEPH)--At least fifty (50) minutes of time spent in an activity meeting the Board's continuing education requirements.

(19) [~~(18)~~] Council of Landscape Architectural Registration Boards (CLARB)--An international nonprofit organization whose

members are landscape architectural licensing boards of the U.S. states and Canadian provinces that license landscape architects.

(20) [~~(19)~~] Delinquent--A registration status signifying that a Landscape Architect

(A) has failed to remit the applicable renewal fee to the Board and

(B) is no longer authorized to practice Landscape Architecture in Texas or use any of the terms restricted by the Landscape Architects' Registration Law.

(21) [~~(20)~~] Direct Supervision--The amount of oversight by an individual overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(22) [~~(21)~~] E-mail Directory--A listing of e-mail addresses

(A) used to advertise landscape architectural services and

(B) posted on the Internet under circumstances where the Landscape Architects included in the list have control over the information included in the list.

(23) [~~(22)~~] Emeritus Landscape Architect (or Landscape Architect Emeritus)--An honorary title that may be used by a Landscape Architect who has retired from the practice of Landscape Architecture in Texas pursuant to §1052.155 of the Texas Occupations Code.

(24) [~~(23)~~] Energy-Efficient Design--The design of a project and the specification of materials to minimize the consumption of energy in the use of the project. The term includes energy efficiency strategies by design as well as the incorporation of alternative energy systems.

(25) [~~(24)~~] Feasibility Study--A report of a detailed investigation and analysis conducted to determine the advisability of a proposed landscape architectural project from a technical landscape architectural standpoint.

(26) [~~(25)~~] Good Standing--

(A) a registration status signifying that a Landscape Architect is not delinquent in the payment of any fees owed to the Board or

(B) an application status signifying that an Applicant or Candidate is not delinquent in the payment of any fees owed to the Board, is not the subject of a pending TBAE enforcement proceeding, and has not been the subject of formal disciplinary action by a landscape architectural registration board that would provide a ground for the denial of the application for landscape architectural registration in Texas.

(27) [~~(26)~~] Governmental Entity--A Texas state agency or department; a district, authority, county, municipality, or other political subdivision of Texas; or a publicly owned Texas utility.

(28) [~~(27)~~] Governmental Jurisdiction--A governmental authority such as a state, territory, or country beyond the boundaries of Texas.

(29) [~~(28)~~] Inactive--A registration status signifying that a Landscape Architect may not practice Landscape Architecture in the State of Texas.

(30) [~~(29)~~] LAAB--Landscape Architectural Accreditation Board.

(31) [~~(30)~~] Landscape Architect--An individual who holds a valid Texas landscape architectural registration certificate granted by the Board.

(32) [~~(31)~~] Landscape Architect Registration Examination (LARE)--The standardized test that a Candidate must pass in order to obtain a valid Texas landscape architectural registration certificate.

(33) [~~(32)~~] Landscape Architects' Registration Law--Article 249c, Vernon's Texas Civil Statutes, and Chapter 1052, Texas Occupations Code.

(34) [~~(33)~~] Landscape Architectural Accreditation Board (LAAB)--An agency that accredits landscape architectural degree programs in the United States.

(35) [~~(34)~~] Landscape Architectural Intern--An individual participating in an internship to complete the experiential requirements for landscape architectural registration in Texas.

(36) [~~(35)~~] Landscape Architecture--The art and science of landscape analysis, landscape planning, and landscape design, including the performance of professional services such as consultation, investigation, research, the preparation of general development and detailed site design plans, the preparation of studies, the preparation of specifications, and responsible supervision related to the development of landscape areas for:

(A) the planning, preservation, enhancement, and arrangement of land forms, natural systems, features, and plantings, including ground and water forms;

(B) the planning and design of vegetation, circulation, walks, and other landscape features to fulfill aesthetic and functional requirements;

(C) the formulation of graphic and written criteria to govern the planning and design of landscape construction development programs, including:

(i) the preparation, review, and analysis of master and site plans for landscape use and development;

(ii) the analysis of environmental, physical, and social considerations related to land use;

(iii) the preparation of drawings, construction documents, and specifications; and

(iv) construction observation;

(D) design coordination and review of technical submissions, plans, and construction documents prepared by individuals working under the direction of the Landscape Architect;

(E) the preparation of feasibility studies, statements of probable construction costs, and reports and site selection for landscape development and preservation;

(F) the integration, site analysis, and determination of the location of buildings, structures, and circulation and environmental systems;

(G) the analysis and design of:

(i) site landscape grading and drainage;

(ii) systems for landscape erosion and sediment control; and

(iii) pedestrian walkway systems;

(H) the planning and placement of uninhabitable landscape structures, plants, landscape lighting, and hard surface areas;

(I) the collaboration of Landscape Architects with other professionals in the design of roads, bridges, and structures regarding the functional, environmental, and aesthetic requirements of the areas in which they are to be placed; and

(J) field observation of landscape site construction, revegetation, and maintenance.

(37) [~~(36)~~] LARE--Landscape Architect Registration Examination.

(38) [~~(37)~~] Licensed--Registered.

(39) [~~(38)~~] Member Board--A landscape architectural registration board that is part of CLARB.

(40) [~~(39)~~] Nonregistrant--An individual who is not a Landscape Architect.

(41) [~~(40)~~] Principal--A Landscape Architect who is responsible, either alone or with other Landscape Architects, for an organization's practice of Landscape Architecture.

(42) [~~(41)~~] Prototypical--From or of a landscape architectural design intentionally created not only to establish the landscape architectural parameters of a project but also to serve as a functional model on which future variations of the basic landscape architectural design would be based for use in additional locations.

(43) [~~(42)~~] Registrant--Landscape Architect.

(44) [~~(43)~~] Regulatory Approval--The approval of Construction Documents by the applicable Governmental Entity after a review of the landscape architectural content of the Construction Documents as a prerequisite to construction of a project.

(45) [~~(44)~~] Reinstatement--The procedure through which a [~~cancelled,~~] Surrendered [~~,~~] or revoked Texas landscape architectural registration certificate is restored.

(46) [~~(45)~~] Renewal--The procedure through which a Landscape Architect pays a periodic fee so that the Landscape Architect's registration certificate will continue to be effective.

(47) [~~(46)~~] Responsible charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered landscape architects applying the applicable landscape architectural standard of care.

(48) Revocation or Revoked--The termination of a landscape architectural certificate by the Board.

(49) [~~(47)~~] Rules and Regulations of the Board--22 Texas Administrative Code §§3.1 et seq.

(50) [~~(48)~~] Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(51) [~~(49)~~] Secretary-Treasurer--The member of the Board responsible for signing the official copy of the minutes of each Board meeting and maintaining the record of Board members' attendance at Board meetings.

(52) [~~(50)~~] SOAH--State Office of Administrative Hearings.

(53) [~~(51)~~] State Office of Administrative Hearings (SOAH)--A Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings involving the executive branch of Texas government.

(54) [~~(52)~~] Supervision and Control--The amount of oversight by a landscape architect overseeing the work of another whereby

(A) the landscape architect and the individual performing the work can document frequent and detailed communication with one another and the landscape architect has both control over and detailed professional knowledge of the work; or

(B) the landscape architect is in Responsible Charge of the work and the individual performing the work is employed by the landscape architect or by the landscape architect's employer.

(55) [~~(53)~~] Supplemental Document--A document that modifies or adds to the technical landscape architectural content of an existing Construction Document.

(56) [~~(54)~~] Surrender--The act of relinquishing a Texas landscape architectural registration certificate along with all privileges associated with the certificate.

(57) [~~(55)~~] Sustainable Design--An integrative approach to the process of design which seeks to avoid depletion of energy, water, and raw material resources; prevent environmental degradation caused by facility and infrastructure development during their implementation and over their life cycle; and create environments that are livable and promote health, safety and well-being. Sustainability is the concept of meeting present needs without compromising the ability of future generations to meet their own needs.

(58) [~~(56)~~] Table of Equivalents for Experience in Landscape Architecture--22 Texas Administrative Code §3.191 and §3.192 [~~§§3.191 and 3.192~~] (Sections 3.191 and 3.192 of this Chapter).

(59) [~~(57)~~] TBAE--Texas Board of Architectural Examiners.

(60) [~~(58)~~] TDLR--Texas Department of Licensing and Regulation.

(61) [~~(59)~~] Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(62) [~~(60)~~] Texas Guaranteed Student Loan Corporation (TGSLC)--A public, nonprofit corporation that administers the Federal Family Education Loan Program.

(63) [~~(61)~~] TGSLC--Texas Guaranteed Student Loan Corporation.

(64) [~~(62)~~] Vice-Chair--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chair, serves as the Board's presiding officer. If necessary, the Vice-Chair succeeds the Chair until a new Chair is appointed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803231
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER D. CERTIFICATION AND ANNUAL REGISTRATION

22 TAC §3.65, §3.66

The Texas Board of Architectural Examiners proposes amendments to §3.65 and §3.66 of Chapter 3, Subchapter D, pertaining to the annual renewal process and reinstatement. The amendments modify a provision regarding the issuance of a new certificate of registration to a person after his or her previous registration had been cancelled by operation of law. The current rule allows a person from another jurisdiction to receive a new certificate of registration through a reciprocity agreement with the other jurisdiction if the person meets all requirements for reciprocal registration "including the completion a registration examination." The requirements for reciprocal registration specify that a person licensed in another jurisdiction must have become licensed under substantially equivalent licensure requirements applicable in Texas, including examination. Requiring licensees from other jurisdictions to complete the examination again is contrary to the intent of reciprocity agreement and may impede Texas registrants from gaining registration in other jurisdictions. Therefore, the amendment strikes the reference to completing the registration examination from the reciprocity provision. The amendment to §3.66 provides notice that the Board is not permitted to reinstate a certificate of registration that is cancelled by operation of law because it has expired without being renewed for two years. The amendment provides for disciplinary action against a person for practicing or using a title unlawfully during a period in which the person's certificate of registration has been expired. The amendment also changes the rule to allow the board the discretion, under certain circumstances, to reinstate a certificate of registration that has been revoked or surrendered for a period of 5 years or longer. The rule currently prohibits the reinstatement of a certificate of registration 5 years after it was revoked, cancelled or surrendered. As amended, the board would have the discretion to reinstate the certificate subject to the same conditions and limitations that may apply to the probated suspension of a certificate of registration. The amendments would eliminate the use of the term "cancelled" in two different contexts to remove a confusing aspect of the current rule. The amendments would clarify that the board is unable under law to reinstate a certificate of registration that has been cancelled by operation of law and allows the board greater discretion to reinstate a certificate of registration that was terminated under circumstances other than cancellation by operation of law.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there would be no fiscal impact on state and local government.

Ms. Hendricks has also determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rules are as follows: eliminating the examination requirement for a person licensed in another jurisdiction will remove a potential obstacle for Texas registrants who seek registration in other jurisdictions. Since licensees in other jurisdictions and registrants in Texas must pass an examination to obtain licensure, the amendments would allow greater access to licensure and allow consumers greater options for services without diminishing the protection of the public health, safety and welfare. The amendments will also allow a person whose registration has been revoked or surrendered for five years or longer an opportunity to reinstate registration, subject to conditions imposed by the board to protect the public from potential risks from incompetent practices. Finally, the amendments will benefit the public by replacing a relatively obscure provision with a prominent notice that the board does not have the discretion under law to reinstate a certificate of registration that has been cancelled by operation of law. The amended rules will have no adverse impact on small or micro business. Therefore, no economic impact statement or flexibility analysis of these amendments is required.

There will be no change in the cost to persons required to comply with the sections.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendments to these rules are proposed pursuant to §§1051.202, 1051.305, and 1051.353(d), Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to registration. These laws also allow the board the authority to waive any prerequisite for registration for an out-of-state registrant from a jurisdiction which has substantially equivalent licensing requirements and a reciprocity agreement with Texas and provide that a person whose registration has been cancelled by operation of law may obtain a new certificate of registration by complying with the requirements and procedures for obtaining an original certificate, which would include procedures for obtaining an original certificate through reciprocity.

The proposed amendments to these rules do not affect any other statutes.

§3.65. Annual Renewal Procedure.

(a) - (e) (No change.)

(f) If a registration is not renewed within 2 years after the specified registration expiration date, the registration shall be cancelled by operation of law on the two-year anniversary of its expiration without an opportunity for a formal hearing. If a registration is cancelled pursuant to this subsection, the registration may not be reinstated. In order to obtain a new certificate of registration, a person whose registration was cancelled pursuant to this subsection must:

(1) submit an application for registration and satisfy all requirements for registration pursuant to §3.21 of this title (regarding Registration by Examination [~~Section 3.21~~], including the successful completion of the registration examination;

(2) submit an application for registration by reciprocal transfer and satisfy all requirements for registration by reciprocal transfer pursuant to §3.22 of this title (regarding Registration by Reciprocal Transfer [~~Section 3.22, including the successful completion of the registration examination~~]; or

(3) submit an application for registration and demonstrate that he/she moved to another state and is currently licensed or registered and has been in practice in the other state for at least the 2 years immediately preceding the date of the application.

(g) (No change.)

§3.66. Reinstatement.

(a) Once the revocation[~~, cancellation,~~] or Surrender of a Landscape Architect's registration is effective, the registration may be reinstated only after an application for reinstatement is properly submitted and approved and the prescribed reinstatement fee is paid. THE BOARD IS NOT PERMITTED TO REINSTATE A CERTIFICATE OF REGISTRATION WHICH IS CANCELLED BY OPERATION OF LAW DUE TO THE REGISTRANT'S FAILURE TO RENEW THE REGISTRATION WITHIN 2 YEARS AFTER ITS DESIGNATED EXPIRATION DATE.

(b) If a reinstatement Applicant has practiced landscape architecture unlawfully or has used the term "landscape architect," the term "landscape architectural," the term "landscape architecture," or any similar term to describe himself/herself or to describe services he/she has offered or provided in Texas since the effective date of the expiration of the Applicant's revoked registration or the Surrender [~~revocation, cancellation, or Surrender~~] of the Applicant's registration, the reinstatement fee to be paid upon approval of the application shall include an amount equal to the sum of the registration renewal fees for each year since the effective date of the expiration or Surrender. [~~revocation, cancellation, or Surrender.~~]

(c) An application for reinstatement may be denied on the following grounds:

[~~(1) the registration has been revoked for a continuous period of five (5) years or longer;~~]

(1) [~~(2)~~] the reinstatement Applicant has performed an act, omitted an act or allowed an omission, or otherwise engaged in a practice that could serve as the basis for the rejection of an application for registration or for the revocation of a registration; or

(2) [~~(3)~~] the registration was voluntarily Surrendered [~~surrendered~~] in lieu of potential disciplinary action and the Board finds that the approval of the reinstatement application does not appear to be in the public's interest.

(d) If at least five (5) years have passed since the effective date of the revocation [~~, cancellation,~~] or Surrender of a registration, the Board may reinstate the registration fully or subject to a probated suspension under any of the terms and conditions listed in §3.234(c) of this title (regarding Suspension of Registration). In order for the Board to approve an application for reinstatement of a registration which has been revoked or Surrendered for five years or longer, an Applicant shall file [~~one of~~] the following with the [~~shall be required prior to approval of an~~] application for reinstatement:

(1) proof of successful completion of all sections of the current registration examination during the five (5) years immediately preceding reinstatement; [~~or~~]

(2) proof [~~verification~~] that the Applicant currently holds a landscape architectural registration that is active and in good standing in another jurisdiction where the registration requirements are substantially equivalent to Texas landscape architectural registration requirements; or[~~.~~]

(3) an affidavit of one or more Landscape Architects attesting that the Applicant has satisfactorily engaged in the Practice of Landscape Architecture under the Supervision and Control of the Landscape Architect(s) since the effective date of the expiration or Surrender of the Applicant's registration, and proof that the Applicant has fulfilled the continuing education requirements the Applicant would have been required to fulfill as a Registrant during each year since the effective date of the revocation or Surrender of the Applicant's registration.

(e) If a registration was revoked as a result of disciplinary action or Surrendered [~~surrendered~~] in lieu of disciplinary action, the registration shall not be reinstated unless the Applicant:

(1) demonstrates that the Applicant has taken reasonable steps to correct the misconduct or deficiency that led to the revocation or Surrender; [~~surrender;~~]

(2) demonstrates that approval of the application is not inconsistent with the Board's duty to protect the public by ensuring that registrants are duly qualified and fit for registration; and

(3) pays all fees and costs incurred by the Board as a result of any proceeding that led to the revocation or Surrender. [~~surrender.~~]

[~~(f) If a registration is cancelled by operation of law due to the Registrant's failure to renew the registration within 2 years after its designated expiration date, the registration may not be reinstated.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803232
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER A. SCOPE; DEFINITIONS
22 TAC §5.5

The Texas Board of Architectural Examiners proposes an amendment to §5.5 of Chapter 5, Subchapter A, pertaining to defined terms. The amendment adds definitions of the terms "cancellation" and "revocation" as those terms are used in the rules regulating the practice of architecture. The purpose of the amendment is to clarify the rules relating to the termination of an interior designer's certificate of registration. The amendment also serves to draw a distinction between the cancellation and the revocation of a certificate of registration. The definition of the term "cancellation" conforms the rules to Texas Occupational Code §1051.353 which specifies that an expired license is cancelled 2 years after it expires. If the amendment is adopted, the anticipated result would be improved guidance for those who consult the rules. The amendment also changes the definition of the term "reinstatement" to clarify that a cancelled certificate of registration may not be reinstated. The amendment implements Texas Occupational Code Annotated §1051.353 which provides that a certificate of registration cancelled by operation of law cannot be renewed but must be replaced with a new certificate obtained through the standard licensure process. The amendment is intended to clarify the rules to provide notice that a certificate of registration cancelled by operation of law can not be revived.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications to state or local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: The rules relating to the practice of interior design will provide clearer guidance regarding the status of a terminated certificate of registration. The amendment also serves to more explicitly implement statutes which provide for the cancellation of a certificate of registration by operation of law. The amended rule will have no impact on small or micro business.

There will be no change in the cost to persons required to comply with the section. The amendment clarifies and implements

pre-existing law regarding the termination of a certificate of registration and the circumstances under which it may be reinstated. The amendment does not impose any additional regulatory burden upon businesses or individuals. Therefore, no economic impact statement or flexibility analysis of these amendments is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment to this rule is proposed pursuant to §1051.202 and §1051.353, Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners with authority to promulgate rules necessary to enforce laws within the agency's jurisdiction and specify the procedures for renewal of a certificate of registration.

The proposed amendment to this rule does not affect any other statutes.

§5.5. Terms Defined Herein.

The following words, terms, and acronyms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) The Act--The Interior Designers' Registration Law.

(2) Actual Signature--A personal signature of the individual whose name is signed or an authorized copy of such signature.

(3) Administrative Procedure Act (APA)--Texas Government Code §§2001.001 et seq.

(4) APA--Administrative Procedure Act.

(5) Applicant--An individual who has submitted an application for registration or reinstatement but has not yet completed the registration or reinstatement process.

(6) Architectural Interior Construction--A building project that involves only the inside elements of a building and, in order to be completed, necessitates the "practice of architecture" as that term is defined in 22 Texas Administrative Code §1.5.

(7) Authorship--The state of having personally created something.

(8) Barrier-Free Design--The design of a facility or the design of an alteration of a facility which complies with the Texas Accessibility Standards, the Americans with Disabilities Act, the Fair Housing Accessibility Guidelines, or similarly accepted standards for accessible design.

(9) Board--Texas Board of Architectural Examiners.

(10) Cancel, Cancellation, or Cancelled--The termination of a Texas interior design registration certificate by operation of law two years after it expires without renewal by the certificate-holder.

(11) [~~(10)~~] Candidate--An Applicant approved by the Board to take the interior design registration examination.

(12) [~~(11)~~] CEPH--Continuing Education Program Hour(s).

(13) [~~(12)~~] Chair--The member of the Board who serves as the Board's presiding officer.

(14) [~~(13)~~] Construction Documents--Drawings; specifications; and addenda, change orders, construction change directives, and other Supplemental Documents issued by an Interior Designer for the purpose(s) of Regulatory Approval, permitting, or construction.

(15) [~~(14)~~] Consultant--An individual retained by an Interior Designer who prepares or assists in the preparation of technical design documents issued by the Interior Designer for use in connection with the Interior Designer's Construction Documents.

(16) [~~(15)~~] Contested Case--A proceeding, including a licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearings.

(17) [~~(16)~~] Continuing Education Program Hour (CEPH)--At least fifty (50) minutes of time spent in an activity meeting the Board's continuing education requirements.

(18) [~~(17)~~] Delinquent--A registration status signifying that an Interior Designer

(A) has failed to remit the applicable renewal fee to the Board and

(B) is no longer authorized to use the title "interior designer" or the term "interior design" in Texas.

(19) [~~(18)~~] Direct Supervision--The amount of oversight by an individual overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(20) [~~(19)~~] E-mail Directory--A listing of e-mail addresses

(A) used to advertise interior design services and

(B) posted on the Internet under circumstances where the Interior Designers included in the list have control over the information included in the list.

(21) [~~(20)~~] Emeritus Interior Designer (or Interior Designer Emeritus)--An honorary title that may be used by an Interior Designer who has retired from the practice of Interior Design in Texas pursuant to §1053.156 of the Texas Occupations Code.

(22) [~~(21)~~] Energy-Efficient Design--The design of a project and the specification of materials to minimize the consumption of energy in the use of the project. The term includes energy efficiency strategies by design as well as the incorporation of alternative energy systems.

(23) [~~(22)~~] Feasibility Study--A report of a detailed investigation and analysis conducted to determine the advisability of a proposed interior design project from a technical interior design standpoint.

(24) [~~(23)~~] FIDER--Foundation for Interior Design Education Research.

(25) [~~(24)~~] Foundation for Interior Design Education Research (FIDER)--An agency that sets standards for postsecondary interior design education and evaluates college and university interior design programs.

(26) [~~(25)~~] Good Standing--

(A) a registration status signifying that an Interior Designer is not delinquent in the payment of any fees owed to the Board or

(B) an application status signifying that an Applicant or Candidate is not delinquent in the payment of any fees owed to the Board, is not the subject of a pending TBAE enforcement proceeding, and has not been the subject of formal disciplinary action by an interior design registration board that would provide a ground for the denial of the application for interior design registration in Texas.

(27) [~~(26)~~] Governmental Jurisdiction--A governmental authority such as a state, territory, or country beyond the boundaries of Texas.

(28) [~~(27)~~] Inactive--A registration status signifying that an Interior Designer may not practice Interior Design in the State of Texas.

(29) [~~(28)~~] Interior Design--The identification, research, or development of creative solutions to problems relating to the function or quality of the interior environment; the performance of services relating to interior spaces, including programming, design analysis, space planning of non-load-bearing interior construction, and application of aesthetic principles, by using specialized knowledge of interior construction, building codes, equipment, materials, or furnishings; or the preparation of interior design plans, specifications, or related documents about the design of non-load-bearing interior spaces.

(30) [~~(29)~~] Interior Designer--An individual who holds a valid Texas interior design registration certificate granted by the Board.

(31) [~~(30)~~] Interior Designers' Registration Law--Article 249e, Vernon's Texas Civil Statutes, and Chapter 1053, Texas Occupations Code.

(32) [~~(31)~~] Interior Design Intern--An individual participating in an internship to complete the experiential requirements for interior design registration by examination in Texas.

(33) [~~(32)~~] Licensed--Registered.

(34) [~~(33)~~] Member Board--An interior design registration board that is part of NCIDQ.

(35) [~~(34)~~] National Council for Interior Design Qualification (NCIDQ)--A nonprofit organization of state and provincial interior design regulatory agencies and national organizations whose membership is made up in total or in part of interior designers.

(36) [~~(35)~~] NCIDQ--National Council for Interior Design Qualification.

(37) [~~(36)~~] Nonregistrant--An individual who is not an Interior Designer.

(38) [~~(37)~~] Principal--An Interior Designer who is responsible, either alone or with other Interior Designers, for an organization's practice of Interior Design.

(39) [~~(38)~~] Registrant--Interior Designer.

(40) [~~(39)~~] Regulatory Approval--The approval of Construction Documents by a Governmental Entity after a review of the Interior Design content of the Construction Documents as a prerequisite to construction or occupation of a building or facility.

(41) [~~(40)~~] Reinstatement--The procedure through which a [~~cancelled,~~] Surrendered[~~,~~] or revoked Texas interior design registration certificate is restored.

(42) [~~(41)~~] Renewal--The procedure through which an Interior Designer pays a periodic fee so that the Interior Designer's registration certificate will continue to be effective.

(43) [~~(42)~~] Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered interior designers applying the applicable interior design standard of care.

(44) Revocation or Revoked--The termination of a Texas interior design registration certificate by the Board.

(45) [~~(43)~~] Rules and Regulations of the Board--22 Texas Administrative Code §§5.1 et seq.

(46) [~~(44)~~] Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(47) [~~(45)~~] Secretary-Treasurer--The member of the Board responsible for signing the official copy of the minutes from each Board meeting and maintaining the record of Board members' attendance at Board meetings.

(48) [~~(46)~~] SOAH--State Office of Administrative Hearings.

(49) [~~(47)~~] State Office of Administrative Hearings (SOAH)--A Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings involving the executive branch of Texas government.

(50) [~~(48)~~] Supervision and Control--The amount of oversight by an interior designer overseeing the work of another whereby

(A) the interior designer and the individual performing the work can document frequent and detailed communication with one another and the interior designer has both control over and detailed professional knowledge of the work; or

(B) the interior designer is in Responsible Charge of the work and the individual performing the work is employed by the interior designer or by the interior designer's employer.

(51) [~~(49)~~] Supplemental Document--A document that modifies or adds to the technical interior design content of an existing Construction Document.

(52) [~~(50)~~] Surrender--The act of relinquishing a Texas interior design registration certificate along with all privileges associated with the certificate.

(53) [~~(51)~~] Sustainable Design--An integrative approach to the process of design which seeks to avoid depletion of energy, water, and raw material resources; prevent environmental degradation caused by facility and infrastructure development during their implementation and over their life cycle; and create environments that are livable and promote health, safety and well-being. Sustainability is the concept of meeting present needs without compromising the ability of future generations to meet their own needs.

(54) [~~(52)~~] Table of Equivalents for Education and Experience in Interior Design--22 Texas Administrative Code §§5.201 et seq. (Sections 5.201 - 5.203 of this Chapter).

(55) [~~(53)~~] TBAE--Texas Board of Architectural Examiners.

(56) [~~(54)~~] TDLR--Texas Department of Licensing and Regulation.

(57) [~~(55)~~] Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(58) [~~(56)~~] Texas Guaranteed Student Loan Corporation (TGSLC)--A public, nonprofit corporation that administers the Federal Family Education Loan Program.

(59) [~~(57)~~] TGSLC--Texas Guaranteed Student Loan Corporation.

(60) [~~(58)~~] Vice-Chair--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chair, serves as the Board's presiding officer. If necessary, the Vice-Chair succeeds the Chair until a new Chair is appointed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803233
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER C. EXAMINATION

22 TAC §5.51

The Texas Board of Architectural Examiners proposes an amendment to §5.51 of Chapter 5, Subchapter C, pertaining to requirements for taking the professional exam. Under the rule as it currently exists, an applicant for interior design registration may sit for the registration examination created and administered by the National Council of Interior Design Qualification (the "NCIDQ examination") upon the completion of educational requirements and six months of experience working under the direct supervision of a licensed interior designer. Otherwise, an applicant may sit for the NCIDQ examination after completing the full experience requirements working under the direct supervision of a licensed interior designer or an architect. Some applicants gain experience working in jurisdictions that do not license interior designers and, therefore, cannot fulfill the requirements to sit for the examination early. Under the proposed amendment, if an applicant is from a jurisdiction where interior designers are not licensed, the applicant may take the examination after working for six months under the direct supervision of a licensed architect or an interior designer who has passed the NCIDQ examination. The effect of the amendment would be to provide an opportunity for some out-of-state applicants to take the examination early under similar circumstances in which Texas applicants may sit for an early examination.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal impact on state or local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: As amended, the rule would be more equitable in its treatment of applicants from jurisdictions where interior designers are not licensed. Applicants from the jurisdictions would have a similar means of sitting for the registration examination early. The rule will have no adverse impact on small business. Since the amended rule would have no adverse effect upon small and micro-businesses, the agency is not required to complete an economic impact statement or flexibility analysis.

There will be no change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment to this rule is proposed pursuant to §1051.202 and §1053.155 of the Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners with authority to promulgate rules and provide the board authority to adopt rules to establish standards for the amount and type of professional experience necessary for eligibility to take the interior design registration examination.

The proposed amendment to this rule does not affect any other statutes.

§5.51. Requirements.

(a) (No change.)

(b) The Board may approve an Applicant to take the NCIDQ examination only after the Applicant has completed the educational requirements for interior design registration by examination in Texas, has completed at least six (6) months of full-time experience working [~~directly~~] under the Direct Supervision [~~direct supervision~~] of a licensed interior designer, and has submitted the required application materials. In jurisdictions where interior designers are not licensed, the supervision may be under a licensed architect or an interior designer who has passed the NCIDQ examination.

(c) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803234
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER D. CERTIFICATION AND ANNUAL REGISTRATION

22 TAC §5.75, §5.76

The Texas Board of Architectural Examiners (Board) proposes amendments to §5.75 and §5.76 of Chapter 5, Subchapter D, pertaining to the annual renewal process and reinstatement. The amendments modify a provision regarding the issuance of a new certificate of registration to a person after his or her previous registration had been cancelled by operation of law.

The current §5.75 allows a person from another jurisdiction to receive a new certificate of registration through a reciprocity agreement with the other jurisdiction if the person meets all requirements for reciprocal registration "including the successful completion of the registration examination." The requirements for reciprocal registration specify that a person licensed in another jurisdiction must have become licensed under substantially equivalent licensure requirements applicable in Texas, including examination. Requiring licensees from other jurisdictions to complete the examination again is contrary to the intent of reciprocity agreement and may impede Texas registrants from gaining registration in other jurisdictions. Therefore, the amendment strikes the reference to completing the registration examination from the reciprocity provision.

The amendment to §5.76 provides notice that the Board is not permitted to reinstate a certificate of registration that is cancelled by operation of law two years after its expiration without renewal. The amendment provides for disciplinary action against a person for using a title unlawfully during a period in which the person's certificate of registration has been expired. The amendment also changes the rule to allow the Board the discretion, under certain circumstances, to reinstate a certificate of registration that has been revoked or surrendered for a period of five years or longer. Currently the rule prohibits the reinstatement of a certificate of registration five years after it was revoked, cancelled or surrendered. As amended, the Board would have the discretion to reinstate the certificate subject to the same conditions and limitations that may apply to the probated suspension of a certificate of registration. The amendments would eliminate the use of the term "cancelled" in two different contexts to remove a confusing aspect of the current rule. The amendments would clarify that the Board is unable under law to reinstate a certificate of registration that has been cancelled by operation of law and allows the Board greater discretion to reinstate a certificate of registration that was terminated under circumstances other than cancellation by operation of law.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there would be no fiscal impact on state and local government.

Ms. Hendricks has also determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rules are as follows: reciprocal registration without examination of a person licensed in another jurisdiction will remove a potential obstacle for Texas registrants who seek registration in other jurisdictions. Since licensees in other jurisdictions and registrants in Texas must pass an examination to obtain licensure, the amendments would allow greater access to licensure and allow consumers greater options for services without diminishing the protection of the public health, safety and welfare. The amendments will also allow a person whose registration has been revoked or surrendered for five years or longer an opportunity to reinstate registration, subject to conditions imposed by the Board to protect the public from potential risks from incompetent practices. Finally, the amendments will benefit the public by replacing a relatively obscure provision with a prominent notice that the Board does not have the discretion under law to reinstate a certificate of registration that has been cancelled by operation of law. The amended rules will have no adverse impact on small or micro business. Therefore, no economic impact statement or flexibility analysis of these amendments is required.

There will be no change in the cost to persons required to comply with the sections.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendments are proposed pursuant to §§1051.202, 1051.305, and 1051.353(d), Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to registration. These laws also allow the Board the authority to waive any prerequisite for registration for an out-of-state registrant from a jurisdiction which has substantially equivalent licensing requirements and a reciprocity agreement with Texas and provide that a person whose registration has been cancelled by operation of law may obtain a new certificate of registration by complying with the requirements and procedures for obtaining an original certificate--which would include procedures for obtaining an original certificate through reciprocity.

The proposed amendments do not affect any other statutes.

§5.75. Annual Renewal Procedure.

(a) - (e) (No change.)

(f) If a registration is not renewed within two (2) years after the specified registration expiration date, the registration shall be cancelled by operation of law on the two-year anniversary of its expiration without an opportunity for a formal hearing. If a registration is cancelled pursuant to this subsection, the registration may not be reinstated. In order to obtain a new certificate of registration, a person whose registration was cancelled pursuant to this subsection must:

(1) submit an application for registration and satisfy all requirements for registration pursuant to §5.31 of this title (relating to Registration by Examination) [~~Section 5.31~~], including the successful completion of the registration examination;

(2) submit an application for registration by reciprocal transfer and satisfy all requirements for registration by reciprocal transfer pursuant to §5.32 of this title (relating to Registration by Reciprocal Transfer) [~~Section 5.32, including the successful completion of the registration examination~~]; or

(3) (No change.)

(g) (No change.)

§5.76. Reinstatement.

(a) Once the revocation[~~, cancellation,~~] or Surrender [~~surrender~~] of an Interior Designer's registration is effective, the registration may be reinstated only after an application for reinstatement is properly submitted and approved and the prescribed reinstatement fee is paid. THE BOARD IS NOT PERMITTED TO REINSTATE A CERTIFICATE OF REGISTRATION WHICH IS CANCELLED BY OPERATION OF LAW DUE TO THE REGISTRANT'S FAILURE TO RENEW THE REGISTRATION WITHIN 2 YEARS AFTER ITS DESIGNATED EXPIRATION DATE.

(b) If a reinstatement Applicant has used the title "interior designer" or the term "interior design" in violation of the Interior Designers' Registration Law since the effective date of the expiration of the Applicant's revoked registration or the Surrender [~~revocation, cancellation, or surrender~~] of the Applicant's registration, the reinstatement fee to be paid upon approval of the application shall include an amount equal to the sum of the registration renewal fees for each year since the effective date of the expiration or Surrender. [~~revocation, cancellation, or surrender.~~]

(c) An application for reinstatement may be denied on the following grounds:

[~~(1) the registration has been revoked for a continuous period of five (5) years or longer; or~~]

(1) [~~(2)~~] the reinstatement Applicant has performed an act, omitted an act or allowed an omission, or otherwise engaged in a practice that could serve as the basis for the rejection of an application for registration or for the revocation of a registration; or

(2) [~~(3)~~] the registration was voluntarily Surrendered [~~surrendered~~] in lieu of potential disciplinary action and the Board finds that the approval of the reinstatement application does not appear to be in the public's interest.

(d) If at least five (5) years have passed since the effective date of the revocation or Surrender [~~, cancellation, or surrender~~] of a registration, the Board may reinstate the registration fully or subject to a probated suspension under any of the terms and conditions listed in §5.244(c) of this title (relating to Suspension of Registration). In order for the Board to approve an application for reinstatement of a registration which has been revoked or Surrendered for five (5) years or longer, an Applicant shall file [~~one of~~] the following with the [~~shall be required prior to approval of an~~] application for reinstatement:

(1) proof of successful completion of all sections of the current registration examination during the five (5) years immediately preceding reinstatement; [~~or~~]

(2) proof [~~verification~~] that the Applicant currently holds an interior design registration that is active and in good standing in another jurisdiction where the registration requirements are substantially equivalent to Texas interior design registration requirements; or[~~.~~]

(3) an affidavit of one or more Interior Designers attesting that the Applicant has satisfactorily engaged in the Practice of Interior Design under the Supervision and Control of the Interior Designer(s) since the effective date of the expiration or Surrender of the Applicant's registration and proof that the Applicant has fulfilled the continuing education requirements the Applicant would have been required to fulfill as a Registrant during each year since the effective date of the revocation or Surrender of the Applicant's registration.

(e) (No change.)

~~[(f) If a registration is cancelled by operation of law due to the Registrant's failure to renew the registration within 2 years after its designated expiration date, the registration may not be reinstated.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803236
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

CHAPTER 7. ADMINISTRATION

22 TAC §7.10

The Texas Board of Architectural Examiners (Board) proposes an amendment to §7.10 of Chapter 7, pertaining to fees. The proposed amendment would reduce fees for emeritus registration renewal. Since the penalty for late renewal is a percentage of the renewal fee, the proposed amendment makes a corresponding reduction to the amount of the penalty. The proposed amendment also modifies the late renewal period to which the penalty would apply in order to conform to legislative changes which extend the period during which an expired registration may be renewed. The amendment also includes the fee that will be charged by the examination provider for a new version of the architectural registration examination which will become available in July 2008. The proposed amendment clarifies that a fee paid by a check which is refused by the bank upon which the check is drawn due to insufficient funds, errors in routing, or errors in the bank account number will be considered unpaid and late penalties or other penalties will accrue upon the unpaid fee. The amendment also eliminates an obsolete fee for review of the landscape architectural registration examination. The amendment is proposed to make the fees for emeritus status less costly for retired registrants and more equitable for out-of-state emeritus registrants. The amendment also serves to reflect the current fees charged by the examination providers and provide notice that the fee paid by a check which is not honored by the bank is not considered paid. If adopted, emeritus fees charged by the Board will be lower and the fee schedule will provide accurate notice of the fees charged under current law and the current examination fees charged by the examination providers.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be a reduction in fee revenue to the agency resulting in a negative fiscal impact in the amount of $12,977 per year for each of the first five years after the amendment takes effect. There might be an indeterminable positive fiscal impact to the state resulting from the delay for the cancellation of an expired registration from one to two years. However, this impact results from a change in the statute and not the rule which merely reflects the statutory change. There will be no cost to local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result are as follows: a reduction in the cost to retirees to maintain emeritus registration status and clarification of notice to candidates regarding the fee charged by examination providers for the current registration examinations. The rule will also accurately reflect recent legislative changes that provide for the cancellation of an expired certificate of registration two years after it expires in lieu of one year after expiration. The rule will have no adverse impact on small or micro business. Since the rule will not adversely impact small business, the Board is not required to prepare an economic impact statement or flexibility analysis and did not prepare one.

There will be a reduction in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §§1051.202, 1051.353, 1051.651, 1051.357, 1052.054, 1052.155, 1053.052, and 1053.156 of the Texas Occupations Code Annotated and §14(a) of Article 8930, Texas Civil Statutes Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, set fees to cover the cost of administering its laws, impose penalties for late renewal of registration, and charge a fee for the registration and renewal as an emeritus registrant.

The proposed amendment does not affect any other statutes.

§7.10. General Fees.

(a) (No change.)

(b) Effective September 1, 2008 [~~2007~~], the following fees shall apply to services provided by the Board in addition to any fee established elsewhere by the rules and regulations of the Board or by Texas law:
Figure: 22 TAC §7.10(b)

(c) - (d) (No change.)

(e) If a check is submitted to the Board to pay a fee and the bank upon which the check is drawn refuses to pay the check due to insufficient funds, errors in routing, or bank account number, the fee shall be considered unpaid and any applicable late fees or other penalties accrue. The Board shall impose a processing fee for any check that is returned unpaid by the bank upon which the check is drawn.

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803237
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES

SUBCHAPTER A. THE BOARD

22 TAC §661.10

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.10, concerning financial requirements. This section identifies what the board's procedures regarding the payment of salaries and operating expenses. The amendment removes language pertaining to the land surveying fund. The amendment will further clarify the financial procedures of the board.

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will clarify the financial obligations of the board.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed amendment to the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.10. Financial.

(a) Payment of all salaries and other approved operating expenses of the board shall be made by itemized vouchers (claims) [~~on the land surveying fund~~]. Such vouchers (claims) shall be approved by the executive director of the board. The executive director shall maintain complete records of the financial transactions of the board as prescribed by the state comptroller and by law.

(b) Pursuant to the requirements of [~~Chapter~~] §2161.003 of the Government Code, the Texas Board of Professional Land Surveying adopts the rules of the Comptroller of Public Accounts [~~Texas Building and Procurement Commission (formerly the General Services Commission)~~] relating to the Historically Underutilized Business (HUB) Program and stated at 34 [~~1~~] Texas Administrative Code[~~,~~] Part 1 [~~V~~], Chapter 20 [~~111~~], Subchapter B, §§20.11 - 20.16 [~~§§111.11 - 111.16~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803265
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

22 TAC §661.11

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.11, concerning board vacancies. This section identifies what the board's actions will be in case of a board vacancy. The amendment will further clarify the board's procedures.

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will clarify the board policy regarding vacancies.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the

Executive Director not more than 15 calendar days after notice of the proposed amendment to the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.11. Vacancies.

If for any reason, a vacancy shall occur in the board, the chair may [~~shall~~] call a special meeting for the purpose of preparing a notice to the governor asking for the appointment of a new member to fill the unexpired term. If the vacancy shall occur in the office of the chair, the vice chair may [~~shall~~] call the meeting.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803266
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.45

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.45, concerning examinations. This section identifies the examination process. The amendment will further clarify the examination process.

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will clarify the examination process.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed amendment to the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.45. Examinations.

(a) Registered professional land surveyor examinations shall be written and so designed to aid the board in determining the applicant's knowledge of surveying, mathematics, surveying laws, and his/her general fitness to practice the profession as outlined in the Professional Land Surveying Practices Act. The [~~examinations will cover a two-day period and the~~] applicant will be notified at least 10 days in advance of the date, time, duration and place of the examination. If an applicant fails to appear for two successive examinations, the applicant's file will be closed and will not be reopened without the filing of a new application and fee.

(b) Calculators will be permitted to be used during any examination. Only Board approved calculators will be permitted for use during examinations. [~~Any non-communicating, non-text editing silent, handheld, battery operated, nonprinting calculator will be permitted. Calculating and computing devices having a QWERTY keypad arrangement similar to a typewriter or keyboard are not permitted. Such devices include but are not limited to palmtop, laptop, handheld and desktop computers, calculators, databanks, data collectors, and organizers. Calculators with alphanumeric keypads are permitted.~~] No communication/imaging device of any type will be permitted, including but not limited to pagers and cellular phones. Devices or materials that might compromise the security of the examination or the examination process are not permitted in the examination room.

(c) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803267
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

22 TAC §661.48

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Board of Professional Land Surveying or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Professional Land Surveying (TBPLS) proposes the repeal of §661.48, concerning unsuccessful examination. The repeal of this section is to remove language that conflicts with board policy that does not prohibit an applicant from repeating the examination as necessary. The repeal will clarify

board policy that enables an applicant to repeat the examination as many times as warranted.

Sandy Smith, Executive Director, has determined that for the first five year period the repeal is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this repeal.

Ms. Smith has also determined that for each year of the first five years the repeal is in effect the public will benefit from the repeal of the rule because it will remove language regarding unsuccessful examination.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the repeal as proposed.

Comments on the repeal may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed repeal submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed repeal of the section has been published in the *Texas Register*.

The repeal is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The repeal implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.48. Unsuccessful Examination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803268
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

22 TAC §661.50

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.50, concerning the experience that a Surveyor Intern is required to complete.

The amendment will further clarify acceptable surveyor intern experience.

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will clarify the type of experience the board will accept in order to satisfy the two years of experience needed prior to examination to be a registered professional land surveyor.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed amendment to the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.50. Surveyor Intern (SI) Experience Requirements.

The following rules are to be used in evaluating the two years of experience (although some forms provided by the Board may allow an experience breakdown in hours, it is the intent of the Board that the required experience be obtained over a minimum time period of two calendar years) required for the Surveyor in Training, hereinafter referred to as Survey Intern (SI), under the direct supervision of a designated registered professional land surveyor (RPLS) acceptable to the Board:

(1) (No change.)

(2) The TWO years of experience are to be obtained in the area of boundary surveying and boundary determination only. This MINIMUM of two years begins with the date the applicant passes the [~~of notification of the successful completion of the~~] National Council of Examiners for Engineering and Surveying (NCEES) fundamentals of land surveying portion of the examination. Since only boundary related surveying experience will be accepted, the actual time to complete the internship may take longer than two calendar years. Adequate documentation of the conditions of employment as well as the experience gained therein will be required. Regardless of the total number of acceptable hours of experience gained in this manner, a minimum total time of 4,000 hours of experience extended over a minimum of two calendar years will still be required.

(3) - (9) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803269
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

22 TAC §661.58

The Texas Board of Professional Land Surveying (TBPLS) proposes new §661.58, concerning the Texas Guaranteed Student Loan Corporation Defaulters. This rule was under Chapter 663, Subchapter A, Ethical Standards as §663.12. Section 663.12 is repealed and is being proposed as new §661.58 under Chapter 661, Subchapter D, concerning Applications, Examinations, and Licensing. The new section, concerning registrants who are Texas Guaranteed Student Loan Corporation Defaulters, will be in a more suitable chapter.

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this rule.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will be in a more suitable chapter.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the new section may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed section has been published in the *Texas Register*.

The new section is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The new section implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.58. Texas Guaranteed Student Loan Corporation Defaulters.

(a) In accordance with the Texas Education Code, §57.491, holders of licenses as defined in that section who have been identified by the Texas Guaranteed Student Loan Corporation (TGSLC) as student loan defaulters are precluded from having their license renewed unless:

(1) the renewal is the first renewal following the board's receipt of the list including the licensee's name among those in default; or

(2) the licensee presents to the board a certificate issued by the TGSLC certifying that:

(A) the licensee has entered a repayment agreement on the defaulted loan; or

(B) the licensee is not in default on a loan guaranteed by the TGSLC.

(b) Whenever the board has been notified by the TGSLC that a licensee is in default on a student loan the board shall notify the licensee by certified mail of its intention not to renew his/her license upon the license's expiration. The licensee may, in writing within 30 days of receipt of the proposed action, request a hearing. In the absence of such a written request for a hearing the proposed intention not to renew will become final upon informal disposition, pursuant to Title 2, Occupations Code, Chapter 53.

(c) Once the board has received a certificate issued by the TGSLC that:

(1) the licensee has entered a repayment agreement on the defaulted loan; or

(2) the licensee is not in default on a loan guaranteed by the TGSLC, the licensee may apply for his/her license renewal subject to all other requirements for renewal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803273
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

SUBCHAPTER E. CONTESTED CASES

22 TAC §661.62

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.62, concerning Filing of Documents. This rule will be retitled to more accurately reflect the subject of the amendment. The new title of the section will clarify the contents of the rule.

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because the new title will clarify the contents of the rule.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed amendment to the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the

Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.62. Complaint Process [~~Filing of Documents~~].

(a) - (k) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803270
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

CHAPTER 663. STANDARDS OF RESPONSIBILITY AND RULES OF CONDUCT

SUBCHAPTER A. ETHICAL STANDARDS

22 TAC §663.12

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Board of Professional Land Surveying or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Professional Land Surveying (TBPLS) proposes the repeal of §663.12, concerning Texas Guaranteed Student Loan Corporation Defaulters. This section is being moved to Chapter 661, Subchapter D, Applications, Examinations and Licensing. The repeal will remove this rule from Chapter 663, Subchapter A, Ethical Standards.

Sandy Smith, Executive Director, has determined that for the first five year period the repeal is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering the repeal.

Ms. Smith has also determined that for each year of the first five years the repeal is in effect the public will benefit from the repeal because it will remove the rule from a subchapter where it should not be.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the repeal as proposed.

Comments on the repeal may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed repeal submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed repeal of the section has been published in the *Texas Register*.

The repeal is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The repeal implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§663.12. Texas Guaranteed Student Loan Corporation Defaulters.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803271
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.18

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §663.18, concerning Certifications. This section adds language that had been previously in §663.23, concerning certifying services, under Chapter 663, Subchapter B, Professional and Technical Standards. The amendment will further clarify the certification process.

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will add language to clarify the certification process.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed amendment to the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§663.18. Certification.

(a) (No change.)

(b) If the land surveyor certifies, or otherwise indicates, that his/her product or service meets a standard of practice in addition to that promulgated by the Texas Board of Professional Land Surveying, then the failure to so meet both standards may be considered by the board, for disciplinary purposes, to be misleading the public.

(c) Preliminary documents released from a land surveyor's control shall identify the purpose of the document, the land surveyor of record and the land surveyor's registration number, and the release date. Such preliminary documents shall not be signed or sealed and shall bear the following statement in the signature space: "Preliminary, this document shall not be recorded for any purpose." Preliminary documents released from the land surveyor's control which include this text in place of the land surveyor's signature need not comply with the other minimum standards promulgated in this chapter.

(d) A land surveyor [~~Surveyor~~] shall certify only to factual information that the land surveyor has personal knowledge of or to information within his professional expertise as a land surveyor [~~Land Surveyor~~] unless otherwise qualified.

(e) Registered professional land surveyors may certify, using the registrant's signature and official seal, services which are not within the definition of professional land surveying as defined in the Act, provided that such certification does not violate any Texas or federal law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803274
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

22 TAC §663.23

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Board of Professional Land Surveying or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Professional Land Surveying (TBPLS) proposes the repeal of §663.23, concerning Certifying Services. The language in this section is being moved to §663.18, relating to Certifications. The repeal will remove this section and the rule language will be added to an existing rule.

Sandy Smith, Executive Director, has determined that for the first five year period the repeal is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering the repeal.

Ms. Smith has also determined that for each year of the first five years the repeal is in effect the public will benefit from the repeal, because it will delete a rule and move the rule language to an existing rule that is more suitable.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the repeal as proposed.

Comments on the repeal may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed repeal submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed repeal of the section has been published in the *Texas Register*.

The repeal is proposed pursuant to Title 6, Subtitle C, §1071.151 of the Occupations Code, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The repeal implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§663.23. Certifying Services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803272
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 239-5263

♦ ♦ ♦

PART 36. COUNCIL ON SEX OFFENDER TREATMENT

CHAPTER 810. COUNCIL ON SEX OFFENDER TREATMENT

SUBCHAPTER A. LICENSED SEX OFFENDER TREATMENT PROVIDERS

22 TAC §810.5

The Council on Sex Offender Treatment (council) proposes an amendment to §810.5, concerning fees for licensing of sex offender treatment providers.

BACKGROUND AND PURPOSE

The amendment is a result of the passage of House Bill (HB) 2292 (78th Legislature, 2003), §2.42(a), which amended Health and Safety Code, Chapter 12, by adding §12.0111(a), Licensing Fees, to include a permit, certification, or registration. Health and Safety Code, §12.0111(b) states, "Notwithstanding other law, the department shall charge a fee for issuing or renewing a license that is in an amount designed to allow the department to recover

from its license holders all of the department's direct and indirect costs in administering and enforcing the applicable licensing program." The legislation requires that the council, administratively attached to the Department of State Health Services (department), by rule set licensure requirements and standards for those individuals who provide sex offender treatment in this state.

SECTION-BY-SECTION SUMMARY

The amendment to §810.5 includes an increase of $50 for the new applicant biennial application to $350, and a $150 increase for the biennial license renewal fee to $350 in order for the council to recover costs in administering and enforcing the program.

FISCAL NOTE

Allison Taylor, Executive Director of the council, has determined that for each year of the first-five years the section will be in effect, there will be fiscal implications to the state as a result of administering the section as proposed. Ms. Taylor has determined that for Fiscal Years 2009, 2011, and 2013 renewals, 229 licensed sex offender treatment providers licenses will expire September 30, 2008, at an additional cost of $150 to the licensee for the biennium. This will generate an additional $34,350 for the mentioned fiscal years. For Fiscal Years 2010 and 2012 renewals, 220 licensed sex offender treatment providers licenses will expire September 30, 2009, at an additional cost of $150 to the licensee for the biennium. This will generate an additional $33,000 for the mentioned fiscal years. It is not possible to estimate the number of new applicants which would increase revenue $50 per new applicant. The assumption is that the number of licensees will not decrease due to the increase in fees. There is no anticipated negative impact on local employment or anticipated fiscal implications for local government as a result of enforcing or administering the amendment.

Licensed sex offender treatment provider fees have remained the same for the last 10 years. If this fee increase had been spread out over 10 years, it would have been a minimal 3.4% increase per year. Individual licensees are responsible for the payment of their licensure fees. An affected person must meet the current licensure requirements (including possible additional education), pay a $350 initial licensure fee (increase of $50), meet continuing education requirements, and pay an increase in the biennial renewal fee from $200 to $350.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Taylor has also determined that there may be an effect on small businesses or micro-businesses that are required to comply with the section as proposed but only if the small businesses choose to pay or currently pay their employees licensure fees. It is unknown and difficult to determine how many, if any, small businesses fall into this category. There are anticipated economic costs to individuals who are required to comply with the section as proposed. Small and micro-businesses may be responsible for the increase of $50 for the new applicant biennial application to $350, plus an additional $39 charge for the Department of Public Safety criminal history check which is referenced in the existing rule text and a $150 increase for the biennial license renewal fee to $350. It is difficult to estimate the number of small and micro-businesses that will be affected. There are currently 449 licensed sex offender treatment providers. The assumption is that 90% (404) of licensed sex offender treatment providers are in private practice as a small business and 10% are employed by governmental entities. There is no anticipated negative impact on local employment.

ECONOMIC BUSINESS IMPACT AND REGULATORY FLEXIBILITY ANALYSIS

Ms. Taylor has determined that an undetermined number of small businesses may be subject to fee increase under the proposed rule if they choose to pay the licensure fees for their employees. However, individual licensees remain responsible for their own licensure and renewal fees. It is not anticipated that any small businesses affected by the proposed rule will have to alter its business practices due to the rule's implementation.

The proposed rule is in direct response to the legislative mandate found in HB 2292, 78th Legislature, whereby Health and Safety Code, §12.0111(b), was amended to provide that the department shall charge a fee for issuing or renewing a license that is in an amount designed to allow the department to recover from its license holders all of the department's direct and indirect costs in administering and enforcing the applicable licensing program." The council is administratively attached to the department and, thus, is subject to Health and Safety Code, §12.0111(b).

The department and council considered several different alternative fee increases; however, the proposed rule represents the lowest possible fee increase which could be chosen in order for the department and the council to meet the legislative mandate of HB 2292, 78th Legislature. The proposed fee increase, resulting from a legislative mandate, is consistent with the health, safety, or environmental and economic welfare of this state. The legislation requires that the council by rule set licensure requirements and standards for those individuals who provide sex offender treatment in this state.

PUBLIC BENEFIT

In addition, Ms. Taylor has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of administering and enforcing the section is to generate funding to operate the program to ensure and enhance public safety.

REGULATORY ANALYSIS

The department and council have determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department and council have determined that the proposed amendment does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Allison Taylor, Council on Sex Offender Treatment/Professional Licensing and Certification Division, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243, or by e-mail to Allison.Taylor@dshs.state.tx.us. Comments will be ac-

cepted for 30 days following publication of the proposal in the *Texas Register*.

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §110.158, which requires the council to adopt rules consistent with this chapter, and §110.159, which requires the council to charge fees for issuing or renewing a license; and Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license.

The amendment affects Occupations Code, Chapter 110; and Health and Safety Code, Chapter 12.

§810.5. Fees.

(a) New Applicant Fees. The council has established the following license fees.

(1) All new LSOTP, ASOTP, and PSOTP applicants shall submit a non-refundable $350 [~~$300~~] fee for a biennial application. Additional fees will be charged for Federal Bureau of Investigations and Texas Department of Public Safety criminal background checks unless exempt under §810.34 of this title (relating [~~Relating~~] to Frequency of Criminal Background Checks). Fees shall be determined by those agencies conducting the investigation.

(2) All applicants shall comply with the following requirements:

(A) - (B) (No change.)

(C) submit within 90 calendar days of written notification from the council [~~Council~~] any documentation required.

(b) Renewal Fees. Renewal forms and information shall be mailed to each licensee at least 60 days prior to license expiration and mailed to the licensee's last known address as reflected in the council's records.

(1) (No change.)

(2) To renew, a LSOTP, ASOTP, or PSOTP shall include a non-refundable $350 [~~$200~~] fee for a biennial renewal. All applicants shall comply with the following requirements.

(A) - (D) (No change.)

(c) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803275
Walter J. Meyer, M.D.
Chairperson
Council on Sex Offender Treatment
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 1. PLAN OF OPERATION

28 TAC §5.4001

The Texas Department of Insurance proposes amendments to §5.4001(c), concerning provisions in the Texas Windstorm Insurance Association (Association) plan of operation for the financial operations of the Association. The amendments are necessary to authorize the Association to prepare financial information on a calendar year basis only rather than on both a calendar year and syndicate year basis, to calculate assessments for member companies on a calendar year basis rather than a syndicate year basis when funds available to the Association are insufficient to pay operating costs and/or catastrophe losses, and to eliminate a minimum cap (20 percent of a company's percentage of the net direct statewide property insurance market) and a maximum cap (170 percent of a company's percentage of the same market) on a member company's Association assessment percentage.

Under the Insurance Code §2210.051, the Association is composed of all insurers authorized to transact property insurance in this state and operates pursuant to Chapter 2210 of the Insurance Code. The purpose of Chapter 2210 is to provide an adequate market for windstorm and hail insurance. Chapter 2210 "provides a method by which adequate windstorm, hail, and fire insurance may be obtained in certain designated portions of this state." The funding structure for the Association established in Chapter 2210 of the Insurance Code includes assessments to member companies in the event that the Association's operating costs and/or catastrophe losses exceed the Association's premium and other revenue.

The Insurance Code §2210.151 requires the Commissioner to adopt by rule a plan of operation for the Association to provide Texas windstorm and hail insurance in catastrophe areas. The Insurance Code §2210.152(a)(2)(A) requires the plan of operation to include a plan for the equitable assessment of the members of the Association to defray losses and expenses. The Insurance Code §2210.052(a) specifies that Association members shall be assessed Association operating expenses and losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members, and the Insurance Code §2210.052(c) specifies this proportion shall be determined annually in a manner provided by the plan of operation. (As used in this proposal, terms such as "net direct premiums," "voluntary writings in the catastrophe areas," "voluntary premiums for the catastrophe areas," and "similar insurance voluntarily written in the catastrophe areas," refer to windstorm and hail insurance.) The Insurance Code §2210.052(d) specifies that members are entitled to a credit for similar insurance voluntarily written in the catastrophe areas and that the credit shall reduce the member's share of the Association's expenses and losses in accordance with the plan of operation. The Insurance Code §2210.054(a) requires the Association to file annually with the Department a statement summarizing the transactions, conditions, operations and affairs of the Association during the preceding year. The Insurance Code §2210.054(a) also requires that the statement shall cover periods designated by the Department, and the Insurance Code §2210.054(b)(3) requires the statement to be in a form prescribed by the Department. Section

5.4001(b)(8) of the plan of operation requires the Association to submit to the Department an "annual report" on a calendar year basis. Section 5.4001(c)(1)(C)(i) of the plan of operation requires the Association to prepare each year a "statement of earnings" on a syndicate year basis.

On January 9, 2008, the Association filed a petition (Ref. No. P-0108-01) with the Department, seeking to amend the plan of operation to provide that a calendar year rather than a syndicate year be used to prepare the yearly Association statement of earnings and to determine the amount of assessment that would be charged to member companies in the event that funds available to the Association are inadequate to meet operating costs and/or catastrophe losses. On March 24, 2008, the Association filed a second petition (Ref. No. P-0308-05), seeking to amend the plan of operation to eliminate minimum and maximum caps as specified in §5.4001(c)(2)(B) and §5.4001(c)(2)(B)(i) of the plan of operation to adjust the calculation of a member company's assessment percentage. Because the two petitions request amendments to the same section of the plan of operation, this proposal addresses the requests in both petitions.

Proposal to Change from Syndicate Year Basis to Calendar Year Basis for Association Calculations. The proposed amendments to §5.4001(c)(1)(C)(i), §5.4001(c)(1)(C)(ii), and §5.4001(c)(2)(B) of the plan of operation are necessary because the plan of operation in these paragraphs and subparagraphs currently requires the Association to use a syndicate year as a basis for calculations for two purposes: (i) to prepare each year an Association statement of earnings required by §5.4001(c)(1)(C)(i) of the plan of operation; and (ii) to calculate pursuant to §5.4001(c)(2)(B) of the plan of operation the total amount of member company assessments needed at a particular time to pay operating expenses and/or catastrophe losses and then to calculate pursuant to §5.4001(c)(1)(C)(ii) of the plan of operation the specific amount of the assessment each member company is required to pay. This proposal amends §5.4001(c)(1)(C)(i), §5.4001(c)(1)(C)(ii) and §5.4001(c)(2)(B) of the plan of operation to allow the Association to use a calendar year basis rather than a syndicate year basis for calculations for these two specified purposes.

Generally, calculations done on a calendar year basis are less cumbersome and time-consuming than calculations based on a syndicate year, can be prepared and finalized earlier, and reflect more current information. Thus, changing from the syndicate year basis for calculations for the Association to the calendar year basis for calculations is consistent with the requirements of the Insurance Code §2210.152(a)(1) that the plan of operation provide for the efficient and economical administration of the Association.

A syndicate year is determined by the effective and the expiration dates of a policy. For example, syndicate year 2007 covers all policies with an effective date beginning in 2007. Under the syndicate year system, earnings and losses cannot be fully determined until the syndicate year closes. The syndicate year closes when all policies with an effective date in 2007 expire, typically twelve months after the date a policy became effective. Therefore, earnings and losses from syndicate year 2007 will not be fully determined until late in the year 2008. Calculations done by syndicate year attempt to link earnings and losses according to actual policy cycles and require the books for a syndicate year to be kept open for approximately two years.

A calendar year is determined by the Gregorian calendar beginning each year on January 1 and ending on December 31. All premiums and revenue taken in during a particular calendar year are added together, and losses and expenses incurred during the same calendar year are subtracted from the calendar year total of premiums and revenue. Calendar year premiums, revenue, and losses can be determined quickly after the close of the calendar year on December 31.

Using a Calendar Year as a Basis for the Statement of Earnings. The Insurance Code §2210.054(a) requires the Association to file annually with the Department a statement summarizing the transactions, conditions, operations and affairs of the Association during the preceding year. Subsections (a) and (b)(3) of the Insurance Code §2210.054 require that the statement cover periods designated by the Department.

Section 5.4001(b)(8) of the plan of operation requires that the Association "file with the Department annually a statement which shall summarize the transactions, conditions, operations, and affairs of the Association during the preceding calendar year." The report required by §5.4001(b)(8) of the plan of operation is the Association's "annual report" and is prepared on a calendar year basis. No amendment to §5.4001(b)(8) is proposed.

Section 5.4001(c)(1)(C)(i) of the plan of operation currently provides that "Each year the Association will prepare a statement of earnings by syndicate year. All premiums written, commissions paid, unearned and earned premiums, loss and loss expenses paid and pending will be charged to the syndicate year. All general expense and interest income received will be charged or credited to the current syndicate year."

Section 5.4001(b)(8) and §5.4001(c)(1)(C)(i) of the plan of operation require that the Association keep two sets of books for its financial reporting: one by calendar year for the annual report and one by syndicate year for the statement of earnings.

References in §5.4001(c)(1)(C)(i) of the plan of operation to a "syndicate" year are proposed to be deleted and replaced with the term "calendar" year and the explanation of a "syndicate" year in §5.4001(c)(1)(C)(i) of the plan of operation is proposed to be deleted. The proposed amendments to §5.4001(c)(1)(C)(i) of the plan of operation will eliminate the current requirement that the Association keep two sets of books, one by syndicate year and one by calendar year. The required financial reports of the Association, such as the annual report and the statement of earnings, will be uniformly made on a calendar year basis. The proposed amendments to §5.4001(c)(1)(C)(i) of the plan of operation will allow the Association to complete the statement of earnings following the close of a calendar year on December 31, rather than at the completion of the syndicate year many months later. The Association statement of earnings based on a calendar year will be produced more efficiently by the Association, be understood more easily by the member companies and the public, and be based on more current information. The book-keeping obligations of the Association will become less burdensome.

Using a Calendar Year as a Basis for Association Assessments. The Insurance Code §2210.152(a)(2)(A) requires the Association plan of operation to include a plan for the equitable assessment of the member companies to defray losses and expenses. Pursuant to §5.4001(c)(2)(A) of the plan of operation, the member companies may be required to pay assessments to the Association to adequately provide for the operating expenses of the Association and/or for catastrophe losses. If the board of directors of the Association determines that the funds then available to the Association are insufficient for either or both purposes, the board assesses member companies under the authority of

§5.4001(c)(2)(A)(ii) of the plan of operation in reasonable and necessary amounts to provide for the operating expenses and/or catastrophe losses.

The plan of operation currently requires in §5.4001(c)(2)(B) that the board of directors determine the amount of assessment required for operating expenses and/or catastrophe losses using syndicate year calculations. For example, under the current system of calculating assessments by syndicate year, if a storm occurs in September 2008 and an assessment is necessary, the Association must determine how much of the assessment is due to Association policies with an effective date in 2007 (which may still be in effect in September 2008) and how much is due to policies with an effective date in 2008. Generally, in order to calculate each member company's share of an assessment, the assessment is multiplied by each member company's assessment percentage. The assessment percentage is determined annually and is generally described as the ratio of the member company's net direct premiums written statewide to the aggregate net direct premiums written statewide by all members of the Association, adjusted by a credit for each member company's voluntary premiums written in the catastrophe areas.

Using the example of a storm occurring in September 2008 and using the syndicate year basis of calculation required by §5.4001(c)(2)(C)(ii), the member company's assessment percentage applicable to 2007 will be multiplied by the amount of the assessment due to Association policies with an effective date in 2007 (syndicate year 2007), and the member company's assessment percentage applicable to 2008 will be multiplied by the amount of the assessment due to Association policies with an effective date in 2008 (syndicate year 2008). The resulting two figures will be added together to determine each company's total assessment amount for the single event occurring in September 2008.

However, there are two problems inherent in using a syndicate year as a basis of calculation: (i) final figures for syndicate years are frequently not available at the time of an assessment and require later reconciliation; and (ii) the current use of a syndicate year basis in determining assessments delays the effect of increases or decreases in voluntary writings in the catastrophe areas on the amount of a member company's assessment.

Using the September 2008 example, some of the premiums, revenue, expenses, and losses for Association policies with an effective date in 2007 that have not expired as of the date of the loss in September 2008, and much of the premiums, revenue, expenses, and losses for Association policies with an effective date in 2008 in effect as of the date of the loss, are not yet known. After the assessment is made, calculations for syndicate year 2007 must be finalized; and then even later in 2009, calculations for syndicate year 2008 must be completed. The assessment for the September 2008 storm must be reconciled against the final accounting for syndicate years 2007 and 2008. If member companies overpaid their share of an assessment, they receive a refund; if member companies underpaid their share of an assessment, they receive an additional notice of assessment.

As the September 2008 example illustrates, policies with effective dates in two different years are usually in effect at the time of an assessment. Section 5.4001(c)(1)(C)(ii) of the plan of operation currently requires that the assessment portion for the prior syndicate year be multiplied by the member company's prior year's assessment percentage and that the assessment portion for the current syndicate year be multiplied by the member company's assessment percentage for the current year. Assessment percentages, which are determined annually, are required by §5.4001(c)(2)(B) and §5.4001(c)(2)(B)(i) of the plan of operation to be adjusted by a credit for similar insurance voluntarily written in the catastrophe areas. Therefore, part of an assessment determined under the current plan of operation is based on an assessment percentage applicable to a prior syndicate year, which may not reflect recent voluntary writings in the catastrophe areas, or may reflect voluntary writings no longer in effect.

Section 5.4001(c)(1)(C)(ii), §5.4001(c)(2)(B), and §5.4001(c)(2)(B)(i) of the plan of operation are proposed to be amended to delete references to "syndicate" year and replace them with the term "calendar" year so that assessments will be calculated on a calendar year basis. Using the September 2008 example and using the proposed calendar year basis of calculation, the Association will determine the amount of assessment needed after the storm according to the premium and revenue available to date for calendar year 2008, including available funds in the catastrophe reserve trust fund and from reinsurance proceeds, if applicable. Because the proposed amendments will make the determination of the assessment based on the calendar year only, the Association will use one set of figures rather than the two sets of figures required by the syndicate year basis, and the assessment will be easier to prepare. There will be no need to refer to 2007 calculations for the Association's earnings and losses, because the assessment amount will be based on insured losses, operating expenses, and premiums and other revenue transactions of the Association that occurred during calendar year 2008. Under most circumstances, calculations for an assessment prepared on a calendar year basis will eliminate the need to reconcile final figures, reducing the need for refunds or further assessments. Under the proposed amendments, all of an assessment will be determined using the current assessment percentage, which reflects member companies' most recent voluntary writings in the catastrophe areas. Eliminating the delay in the effect of member companies' increased or decreased voluntary writings in the catastrophe areas will provide an incentive to all member companies to maintain or provide similar insurance in the catastrophe areas, which may reduce property owners' reliance on the Association to provide windstorm and hail insurance coverage.

Proposal to Eliminate Minimum and Maximum Caps on Member Companies' Assessment Percentages. The Insurance Code §2210.052(a) and §2210.052(c) specify that Association members shall be assessed Association operating expenses and losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members and that this proportion shall be determined annually in a manner provided by the plan of operation. The Insurance Code §2210.052(b) requires the Department to review data and information it considers necessary to determine the annual assessment percentage and to provide that information to the Association. The Insurance Code §2210.152(a)(2)(A) requires the plan of operation to include a plan for the equitable assessment of the members of the Association to defray losses and expenses. The Insurance Code §2210.052(d) specifies that members are entitled to a credit for similar insurance voluntarily written in the catastrophe areas and that this credit is to be used to reduce a member's assessment percentage in accordance with the plan of operation. The plan of operation in §5.4001(c)(2)(B) and §5.4001(c)(2)(B)(i) specifies the minimum and maximum caps to be used to adjust the calculation of a member company's assessment percentage. The proposed

amendments to §5.4001(c)(2)(B) and §5.4001(c)(2)(B)(i) will eliminate these minimum and maximum caps. The following explains the existing method of applying the minimum and maximum caps and why the resulting assessment percentages are not reflective of voluntary writings in the catastrophe areas and why the elimination of minimum and maximum caps on companies' Association assessment percentages will result in assessment percentages that more accurately reflect the credit for a member company's voluntary writings in the catastrophe areas, or lack thereof.

Pursuant to §5.4001(c)(2)(B) and §5.4001(c)(2)(B)(iv) of the plan of operation, as a part of the regular operations of the Association, the Association receives information from the Department on the aggregate net direct premiums written in the state during the preceding calendar year and the net direct premiums written in the state by each member company during the same period. Each member company's percentage of the net direct premiums written in the state is calculated from those annual figures. Thus, a company's assessment percentage for 2008 is based on premium information supplied to the Department for calendar year 2007.

To implement the requirement in the Insurance Code §2210.052(d) that members are entitled to a credit for similar insurance voluntarily written in the catastrophe areas, §5.4001(c)(2)(B)(i) of the plan of operation requires the determination of a member company's "normal required quota" of business in the catastrophe areas for the preceding calendar year. A member company's normal required quota of business in the catastrophe areas is calculated by multiplying its percentage of the net direct statewide market for the preceding calendar year by the total premiums written in the catastrophe areas (which are total Association premiums plus total voluntary premiums for the catastrophe areas) during the preceding calendar year. The total of the company's actual written premiums in the catastrophe areas for the preceding calendar year is then subtracted from the member company's normal required quota for the same time period. The difference is then divided by the total of all member companies' normal required quotas for the preceding calendar year minus their actual written premiums in the catastrophe areas during the preceding calendar year. The resulting quotient is a member company's unadjusted assessment percentage for the following calendar year.

Currently, pursuant to §5.4001(c)(2)(B)(i) of the plan of operation, the member company's unadjusted assessment percentage is then compared to its percentage of net direct statewide premiums written during the preceding calendar year. If the member company's unadjusted assessment percentage is less than 20 percent of the company's percentage of the net direct statewide premiums written during the preceding calendar year, the unadjusted assessment percentage is adjusted upward to 20 percent of the company's percentage of net direct statewide premiums written during the preceding calendar year (minimum cap). If the company's unadjusted assessment percentage is more than 170 percent of the company's percent of the net direct statewide premiums written during the preceding calendar year, the quotient is adjusted downward to 170 percent of the company's percentage of net direct statewide premiums written during the preceding calendar year (maximum cap). While the application of minimum and maximum caps to the assessment percentage is required by the plan of operation, it is not required by Chapter 2210 of the Insurance Code. The adjusted assessment percentage (after the application of an offset factor designed to ensure that the sum of all member companies' assessment percentages totals 100 percent) is the net assessment percentage for a member company for the following calendar year.

If, pursuant to the Insurance Code §2210.052, §2210.058, and §2210.152(a)(2)(A), an assessment is necessary, the net assessment percentage for a member company is then multiplied by the total amount of assessment the board of directors has determined is needed pursuant to §5.4001(c)(2)(B) of the plan of operation. Under §5.4001(c)(2)(D)(i) of the plan of operation, the member company must remit this amount within 30 days of the receipt of the notice of assessment or have its certificate of authority to transact the business of insurance suspended by the Commissioner until such time as the Association certifies to the Commissioner that such assessment has been paid in full.

Therefore, the proposed amendments to §5.4001(c)(2)(B) and §5.4001(c)(2)(B)(i) of the plan of operation are necessary to eliminate the application of minimum and maximum caps on member companies' Association assessment percentages because the use of the caps results in assessment percentages that are not reflective of voluntary writings in the catastrophe areas. The elimination of minimum and maximum caps on companies' Association assessment percentages will result in assessment percentages that more accurately reflect a member company's voluntary insurance writings in the catastrophe areas, or lack thereof.

Additionally, the elimination of the minimum cap allows a member company to fully realize the benefits of its voluntary writings in the catastrophe areas and results in a less costly assessment for the company if an assessment is necessary. Under current §5.4001(c)(2)(B)(i) of the plan of operation, a company that has written its entire normal required quota in the catastrophe areas during the preceding calendar year would have an unadjusted assessment percentage calculated at less than 20 percent of its percentage of net direct statewide premiums written during the preceding calendar year. The unadjusted assessment percentage would nonetheless be adjusted upward to 20 percent of its percentage of net direct statewide premiums written during the preceding calendar year, resulting in a loss of credit for voluntary writings greater than zero percent but less than 20 percent of a company's percentage of net direct statewide premiums written during the preceding calendar year. Under the proposed amendments to §5.4001(c)(2)(B)(i) of the plan of operation, a member company's unadjusted assessment percentage ranging from any percentage greater than zero to 20 percent of its percentage of net direct statewide premiums written will become the net assessment percentage (after application of a final offset factor) reflecting full credit for voluntary writings in the catastrophe area during the preceding calendar year.

Conversely, under current §5.4001(c)(2)(B)(i) of the plan of operation, a company with a sizable market share but a small amount of voluntary writings in the catastrophe areas during the preceding calendar year, may have an unadjusted assessment percentage calculated that is more than 170 percent of its percentage of net direct statewide premiums written during the preceding calendar year. The assessment percentage is nonetheless adjusted down to 170 percent of its percentage of net direct statewide premiums written during the preceding calendar year. Thus, the maximum cap, in effect, provides a member company a credit for voluntary writings that do not exist. Under the proposed amendments to §5.4001(c)(2)(B)(i) of the plan of operation, a member company with relatively few or no voluntary writings in the catastrophe areas during the preceding calendar year

will not have its assessment percentage capped at 170 percent of the company's percentage of net direct statewide premium written for the preceding calendar year, which will result in a more costly assessment for the company.

The following amendments are proposed to the chart in §5.4001(c)(2)(B)(i) which illustrates the calculations of §5.4001(c)(2)(B)(i) of the plan of operation. The title of the chart is proposed to be changed to "TEXAS WINDSTORM INSURANCE ASSOCIATION PROCEDURE FOR CALCULATING MEMBER ASSESSMENT PERCENTAGES INCLUDING CREDIT FOR VOLUNTARY WRITINGS." This is necessary to update the current name of the Association and to use the more current terminology "assessment percentage" instead of "pool participation." An amendment is proposed to delete a reference in Column 2 of the chart to "40%," which was formerly used to arrive at a calculation for total statewide net direct written premiums and is now obsolete and replace it with "50%," which is currently used to arrive at a calculation for statewide net direct written premiums according to §5.4001(c)(2)(B)(i). An amendment is proposed to delete a reference in Column 4 to the obsolete name "TCPIA" and replace it with a reference to the "Association." In Column 8, the proposed amendments delete the term "assignment" from the title and replace it with the phrase "Association assessment percentage." The proposed amendments delete the phrase "assignment after offset factor" from the title of Column 9, and replace it with the phrase "net Association assessment percentage," to indicate that this is the final step in the calculations. The proposed amendments add the phrase "(after application of offset)" under the title in Column 9. This is necessary because the phrase indicates that the application of an offset factor that ensures that the sum of all member companies' assessment percentages total 100 percent is the final step in the assessment percentage calculation. The application of an offset factor, however, is a statistical adjustment that is not affected by this rule proposal. The proposed amendments delete all of Columns 10 and 11 because they refer to the application of minimum and maximum caps and delete two obsolete footnotes to the chart.

Proposed Non-substantive Changes. The proposed amendments also delete references in §5.4001(c) of the plan of operation to the obsolete name "Texas Catastrophe Property Insurance Association" and replace them with references to the "Association." For purposes of consistency throughout the subsection, the proposed amendments delete the use of the term "premium" and replace it with the term "premiums" and delete the use of the term "area" and replace it with the term "areas." The use of the term "areas" is necessary because more than one catastrophe area has been designated by the Commissioner pursuant to the Insurance Code §2210.005. The proposed amendments delete all of §5.4001(c)(2)(B)(ii) and §5.4001(c)(2)(B)(iii) of the plan of operation because these provisions specify obsolete assessment procedures. The proposed amendments also redesignate current §5.4001(c)(2)(B)(iv) of the plan of operation as §5.4001(c)(2)(B)(ii) and conform references to the Insurance Code throughout §5.4001(c) of the plan of operation to the updated references enacted in the non-substantive Insurance Code revision by the 79th Legislature in HB 2017, effective April 1, 2007. Proposed amendments also correct non-substantive capitalization, punctuation, and typographical errors throughout the subsection.

FISCAL NOTE. Marilyn Hamilton, Associate Commissioner of the Property and Casualty Program, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Hamilton has further determined that for each year of the first five years the proposed amendments are in effect, the public benefit and costs anticipated as a result of administering the proposed amendments will be as follows.

Proposal to Change from Syndicate Year Basis to Calendar Year Basis for Association Calculations.

Using a Calendar Year as a Basis for the Statement of Earnings. The public benefit of the proposed amendments to §5.4001(c)(1)(C) of the plan of operation will be an improved Association plan of operation that will provide for a more efficient and economical administration of the Association, as mandated by the Insurance Code §2210.152(a)(1). The components of the statement of earnings required by §5.4001(c)(1)(C) of the plan of operation will be determined sooner and more efficiently. The Association statement of earnings will be based on more current information and will be prepared sooner because the data on which the report is based will be available sooner. As a result, the Association statement of earnings will be easier for the member companies and the public to understand.

There will be a small cost savings to the Association in preparing the statement of earnings because both the annual report and the statement of earnings will be based on the same information. Pursuant to §5.4001(b)(8), the current plan of operation requires a summary of the transactions, conditions, operation and affairs of the Association for the previous calendar year for the annual report, and pursuant to §5.4001(c)(1)(C)(i), the current plan of operation also requires a report of premiums written, commissions paid, unearned and earned premiums, loss and loss expenses paid and pending for the previous syndicate year for the statement of earnings. The information required for the annual report is more extensive than the information required for the statement of earnings, but the time period of the compiled information for the annual report is different from that of the statement of earnings. Under the proposed amendments, the information compiled for the annual report by calendar year will be used for both the annual report and the statement of earnings. There will be no cost to the member companies resulting from the proposed amendments to the plan of operation specifying that the Association prepare a statement of earnings on a calendar year basis.

Using a Calendar Year as a Basis for Association Assessments. The public benefits of the proposed amendments to §5.4001(c)(1)(C)(ii) and §5.4001(c)(2)(B) of the plan of operation will be an improved Association plan of operation that will provide for (i) a more efficient and economical administration of the Association; (ii) the more equitable assessment of member companies to defray losses and expenses; and (iii) more accurate credit for similar insurance voluntarily written in the catastrophe areas based on more up-to-date data.

The Association will realize some time savings in the event of an assessment because only one set of calculations is needed to determine member companies' assessments using a calendar year basis, as opposed to the two sets of calculations needed to determine member companies' assessments using a syndicate year basis. Calculations using a syndicate year basis always

require consideration of two syndicate years, even though only a single event may be involved.

Pursuant to §5.4001(c)(2)(A)(ii) of the plan of operation, which is not proposed to be amended, the Association board of directors first determines the size of the assessment reasonable and necessary to provide for Association operating expenses and/or catastrophe losses. Under the current syndicate year basis of calculation required by §5.4001(c)(2)(B), the total assessment is apportioned into an assessment for the prior syndicate year (because policies from that year will still be in effect) and an assessment for the current syndicate year. The member companies' assessment percentages for each syndicate year is multiplied by the apportionment of the assessment for that syndicate year, and the two figures are added together to determine a member company's total assessment for a single event.

Under the proposed amendments, the total assessment will be determined as required by §5.4001(c)(2)(A)(ii). However, there will be no need to apportion the assessment by syndicate year; it will all be applicable to the current calendar year. The member company's assessment percentage for the current calendar year will be multiplied by the assessment amount. This will result in a member company's assessment being determined in one step under the proposal compared to multiple steps under the current procedure.

Another benefit will be the elimination of supplemental notices of assessment made necessary by the syndicate year basis of calculation. The Association estimates that the mailing expense to member companies of supplemental notices of assessment necessary to reconcile calculations based on a syndicate year is approximately $1,000 for an event that would result in an assessment. Thus, it is anticipated that the Association will save that amount in operating expenses per assessment if assessments were calculated on a calendar year basis rather than a syndicate year basis.

There will be some benefit to the member companies because assessments based on a calendar year will require the companies to only respond to a single notice of assessment rather than to an initial notice and a supplemental notice as required for assessments based on a syndicate year.

The current use of a syndicate year basis in determining assessments delays the effect of increases or decreases in voluntary writings in the catastrophe areas on the size of a member company's assessment because part of an assessment is based on an assessment percentage applicable to a prior syndicate year. Eliminating this delay is an important public benefit because it will provide an incentive to all member companies to maintain or provide similar insurance in the catastrophe areas, thereby reducing property owners' reliance on the Association to provide windstorm and hail insurance coverage.

In the event of an assessment, if a calendar year is used as the basis for calculating assessments rather than a syndicate year, member companies will benefit if the company has increased voluntary writings in the catastrophe areas during the most recently completed calendar year. Conversely, a member company that has decreased voluntary writings during the most recently completed calendar year will be subject to a greater assessment in the current calendar year as a result of the decrease in voluntary writings.

Proposal to Eliminate Minimum and Maximum Caps on Member Companies' Assessment Percentages. The public benefit anticipated as a result of administering the proposed amendments eliminating minimum and maximum caps on a member company's assessment percentage will be that the company's credit for voluntary writings will more accurately and equitably reflect the company's actual voluntary writings. This is consistent with the Insurance Code §2210.052(d) and §2210.152(a)(2)(A) which provide that a member company is entitled to receive credit for similar insurance voluntarily written in the catastrophe areas in accordance with the plan of operation and that the plan of operation include a plan for the equitable assessment of the members of the Association to defray losses and expenses. A member company's unadjusted assessment percentage greater than zero percent but less than 20 percent of its percentage of net direct statewide premiums written will not be adjusted up to 20 percent, but will reflect the actual credit for similar insurance voluntarily written in the catastrophe areas in the preceding calendar year. A member with few or no voluntary writings in the catastrophe areas will no longer have an assessment percentage capped at 170 percent of its percentage of net direct statewide premiums written. Thus, the Association's assessment of members to defray losses and expenses will also be more equitable because member companies writing voluntary insurance in the catastrophe areas will receive full credit for their voluntary writings in the preceding calendar year, and member companies with no or few voluntary writings in the catastrophe areas in the preceding calendar year will no longer receive credit for voluntary writings that do not exist. Thus, while the total of the assessment to all member companies will remain the same because the total assessment is based under §5.4001(c)(2)(A)(ii) on the amount the Association's board of directors has determined is "reasonable and necessary to provide for such operating expense and/or such catastrophe loss," an individual member company's assessment percentage of the total assessment may increase or decrease because of the elimination of the minimum and maximum caps on assessment percentages.

There will be no additional costs to the Association for the elimination of the application of minimum and maximum caps in the calculation of assessment percentages.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(a)(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(a)(1) does not specify a maximum level of gross receipts for a "micro business." The persons that are required to comply with the proposed amendments are the Association and the member companies required to pay assessments when funds available to the Association are insufficient to provide adequately for operating expenses of the Association and/or the Association's catastrophe losses.

The Association Is Not a Small Business. The Association does not meet the definition of a "small business" under the Government Code §2006.001(a)(2). The Association is an "Association

... composed of all property insurers authorized to engage in the business of property insurance in this state," formed under the authority of the Insurance Code §2210.051. It is not a corporation, partnership, nor sole proprietorship. It is not formed for the purpose of making a profit, but to provide a method by which adequate windstorm and hail insurance may be made available in certain designated portions of this state, as mandated by the Insurance Code §2210.001. Under the Insurance Code §2210.056, the net earnings of the Association may not inure to the benefit of private shareholders or individuals, and the assets of the Association may not be used other than to satisfy claims on policies, make investments authorized under applicable law, pay reasonable and necessary administrative expenses, and purchase reinsurance or prepare for or mitigate the effects of catastrophic natural events. Under the Insurance Code §2210.452, all premium and other revenue of the Association in excess of incurred losses and operating expenses is paid to a catastrophe reserve trust fund or a reinsurance program approved by the Commissioner. Further, under the Insurance Code §§2210.056 and 2210.452, on the dissolution of the Association, all assets revert to the state. The Association is not "independently owned and operated." In addition to not being owned by its members, under the Insurance Code §§2210.101 and 2210.102, the Association operates with a nine member board of directors responsible and accountable to the Commissioner. The Association provides windstorm and hail insurance according to a plan of operation as specified by the Insurance Code §2210.152 and adopted by the Commissioner by rule pursuant to the Insurance Code §2210.151. Further, the Association has approximately 150 employees and net receipts over $6 million. Therefore, an economic impact statement and a regulatory flexibility analysis is not required for the Association because the Association as governed by the provisions of Chapter 2210 of the Insurance Code is not a small business for purposes of the Government Code §2006.002(c).

The Effect of the Proposed Amendments on Small or Micro Businesses.

Change from Syndicate Year Basis to Calendar Year Basis for Association Calculations. The Department has determined that the change in computation of data for the Association statement of earnings will not affect any small or micro businesses under the Government Code §2006.002(c) because there will be no additional costs to any member company, regardless of size, including small and micro businesses, as a result of the proposed amendment to change the computation of data for the Association statement of earnings from a syndicate year basis to a calendar year basis.

The Department is unable to determine the effect of the computation of an assessment on a calendar year basis rather than a syndicate year basis on small or micro businesses because one important variable, the timing of a storm, is unpredictable; and other important variables are dependent upon the business calculations of various entities.

One variable that cannot be predicted is the date of the occurrence of a storm. Under a syndicate year basis for assessment calculations, if a storm occurs early in a year, a large percentage of the policies in effect will have become effective in the prior year, and the assessment percentage applicable to the prior year will be applicable to a greater amount of the losses. If a storm occurs late in the same year, a larger number of the policies in effect will have become effective in the current year, and the current assessment percentage will be applicable to a greater amount of the losses.

The assessment percentage for each member company is governed by the Insurance Code §2210.052 and §5.4001(c)(2)(B)(i) of the plan of operation and is calculated using the same method whether a syndicate year basis for assessment calculations is used or a calendar year basis for assessment calculations is used. The assessment percentage is determined annually and is generally described as the ratio of the member company's net direct premiums written statewide to the aggregate net direct premiums written statewide by all members of the Association, adjusted by a credit for each member company's voluntary premiums written in the catastrophe areas. The assessment percentage for a small or micro business that is a member company can change from year to year depending on changes in the company's percentage of net direct premiums written statewide and/or changes in the company's participation in voluntary writings in the catastrophe areas. Changes in the voluntary writings of other businesses, such as an increase or decrease of percentage of net direct premiums written statewide and an increase or decrease of their voluntary writings in the catastrophe areas, also affect calculations of small or micro businesses' percentage of net direct premiums written statewide and their percentage of voluntary premiums written in the catastrophe areas. In general, if a company of any size, including a small or micro business, writes more premiums in the catastrophe areas and its percentage of net direct premium written statewide stays the same, its assessment percentage will adjust downward. If a company writes less premiums in the catastrophe areas and its percentage of net direct premiums written statewide stays the same, its assessment percentage will adjust upward.

Under a calendar year basis of assessment, the assessment percentage of each member company relies exclusively on data for the company from the most recently completed calendar year. Under the proposed amendments, if an assessment is made, any member company regardless of size, including a small or micro business, will have its share of the assessment calculated solely by an assessment percentage that reflects the most current data on each company's market share in the statewide market and its voluntary writings in the catastrophe areas.

In accordance with the Government Code §2006.002(c-1), the Department has determined that even though the proposal to calculate member company assessments on a calendar year basis rather than a syndicate year basis may have an adverse economic impact on small or micro businesses that are required to comply with the proposal, the proposal does not require a regulatory flexibility analysis mandated by the Government Code §2006.002(c)(2). Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small or micro businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) of the Government Code requires that the regulatory flexibility analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Section 2001.002(g) of the Government Code requires the Attorney General, in consultation with the Comptroller, to prepare guidelines to assist a state agency: (i) in determining a proposed rule's potential adverse economic effects on small businesses; and (ii) in identifying and evaluating alternative methods of achieving the purpose of a proposed rule.

According to these Attorney General guidelines published in the February 1, 2008, edition of the *Texas Register* (33 TexReg 985): "An agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small businesses would not be protective of the health, safety and environmental and economic welfare of the state [footnote deleted]. One example clearly fits within this exception. Agencies may be required to adopt as rules specific fees or specific standards and procedures under a legislative or federal mandate. In such a situation, the mandated language may be considered per se consistent with the health, safety, or environmental and economic welfare of the state and the agency need not consider other regulatory methods." The calculation of a member company's assessment percentage under Chapter 2210 of the Insurance Code constitutes specific standards and procedures proposed under legislative mandates that (i) there be "a plan for the equitable assessment of the members of the Association to defray losses and expenses" as provided in the Insurance Code §2210.152(a)(2)(A); and (ii) Association members be assessed Association operating expenses and/or losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members as provided in the Insurance Code §2210.052(a).

Under the Insurance Code §2210.001, the purpose of Chapter 2210 is to provide an adequate market for windstorm and hail insurance in this state. Chapter 2210 "provides a method by which adequate windstorm, hail, and fire insurance may be obtained in certain designated portions of this state." The Insurance Code §2210.051(a) requires all property insurers authorized to engage in property insurance in the state to be members of the Association.

The Insurance Code §2210.152(a)(2)(A) requires the plan of operation to include "a plan for the equitable assessment of the members of the Association to defray losses and expenses." Because all property insurers authorized to engage in property insurance in the state are required to be members, the establishment of an equitable assessment plan requires developing assessment procedures equitable to all members, regardless of size.

The Insurance Code §2210.052(a) specifies that Association members shall be assessed Association operating expenses and/or losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members, and the Insurance Code §2210.052(c) specifies that this proportion shall be determined annually in a manner provided by the plan of operation.

The proposed amendment to §5.4001(c)(2)(B) of the plan of operation to change the determination of a member company's assessment from a syndicate year basis to a calendar year basis will eliminate the current delay in the effect of increases or decreases in voluntary writings on the size of a member company's assessment. Therefore, if a small or micro business increases its voluntary writings in the designated catastrophe areas, the small or micro business will have a reduced assessment and will have it earlier than under the current syndicate year basis for calculating assessments. Alternatively, if a small or micro business decreases its voluntary writings in the designated catastrophe areas, the small or micro business will have an increased assessment and will have it earlier than under the current syndicate year basis for calculating assessments. In either situation, the outcome can be influenced by the small or micro business by the business decisions that it makes.

Because all of the member companies' assessments, regardless of the size of the company, will be determined on the same calendar year and because all of the member companies will have the incentive to increase their writing of windstorm and hail coverage in the designated catastrophe areas, the change from the syndicate year basis to the calendar year basis for the determination of a member company's assessment is consistent with the requirements in the Insurance Code §2210.152(a)(2)(A) and §2210.052(a). The calculation method of a member company's assessment percentage under Chapter 2210 of the Insurance Code constitutes specific standards and procedures proposed under legislative mandates that (i) there be "a plan for the equitable assessment of the members of the Association to defray losses and expenses" as provided in the Insurance Code §2210.152(a)(2)(A); and (ii) Association members be assessed Association operating expenses and/or losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members as provided in the Insurance Code §2210.052(a). Exempting small and micro businesses from assessment or applying a different method of assessment is not consistent with the legislative mandates (i) that there be "a plan for the equitable assessment of the members of the Association to defray losses and expenses" as provided in the Insurance Code §2210.152(a)(2)(A); and (ii) that Association members be assessed Association operating expenses and/or losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members as provided in the Insurance Code §2210.052(a). Accordingly, the costs for small and micro businesses attributable to this proposal are a result of these legislative mandates. Therefore, in accordance with the Attorney General guidelines issued pursuant to the Government Code §2001.002(g), the legislative mandates "may be considered per se consistent with the health, safety, or environmental and economic welfare of the state and the agency need not consider other regulatory methods."

Elimination of Minimum and Maximum Caps on Member Companies' Assessment Percentages. The proposal to eliminate the application of minimum and maximum caps on assessment percentages may have an adverse economic effect on approximately four to five small or micro businesses that are members of the Association. Pursuant to the Insurance Code §2210.051(a), all property insurers authorized to engage in the business of property insurance in this state are required to be members of the Association. as required by the Insurance Code §2210.051(a). As Association members, these four to five small or micro businesses may be assessed pursuant to §5.4001(c)(2)(A) of the plan of operation if funds available to the Association are of insufficient size to adequately provide for the Association's operating expenses and/or catastrophe losses.

The Association has modeled projected changes in the assessment percentages for all member companies based on the elimination of the application of minimum and maximum caps. Based on this modeling information, four small or micro businesses were identified.

The effect on the four companies will be: (i) Company A's assessment percentage was calculated in 2007 as 0.042%. If the minimum and maximum caps had been eliminated in 2007, Company A's assessment percentage would have slightly increased to 0.045% (+0.003%). (ii) Company B's assessment percentage was calculated in 2007 as 0.036%. If the minimum and maximum caps had been eliminated in 2007, Company B's assessment percentage would have increased to 0.040% (+0.004%). (iii) Company C's assessment percentage was

calculated in 2007 as 0.006%. If the minimum and maximum caps had been eliminated, Company C's assessment percentage would not change. (iv) Company D's assessment percentage was calculated in 2007 as 0.002%. If the minimum and maximum caps had been eliminated in 2007, Company D's assessment percentage also would not change. Thus, based on these four companies, the elimination of the minimum and maximum caps will either have an effect of slightly increasing an assessment percent by 0.003 to 0.004 percent, or have no effect on an individual small or micro business's assessment percentage.

The Association has also modeled the projected assessment percentages if current trends relating to withdrawals from the voluntary market in the catastrophe areas are factored into the same calculations to estimate what may happen in future years. Under these estimates, the projected assessment percentages for Company A, B, and C would decrease after the elimination of the minimum and maximum caps, and Company D's projected assessment percentage would remain the same. Company A's projected assessment percentage after the elimination of minimum and maximum caps would be 0.039% (-0.003%); Company B's projected assessment percentage would be 0.032% (-0.004%); Company C's projected assessment percentage would be 0.005% (-0.001%); and Company D's projected assessment percentage would be 0.002% (no change).

In accordance with the Government Code §2006.002(c-1), the Department has determined that even though the proposal to eliminate minimum and maximum caps from the Association plan of operation may have an adverse economic impact on small or micro businesses that are required to comply with the proposal, the proposal does not require a regulatory flexibility analysis mandated by the Government Code §2006.002(c)(2). Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) of the Government Code requires that the regulatory flexibility analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Section 2001.002(g) of the Government Code requires the Attorney General, in consultation with the Comptroller, to prepare guidelines to assist a state agency: (i) in determining a proposed rule's potential adverse economic effects on small businesses; and (ii) in identifying and evaluating alternative methods of achieving the purpose of a proposed rule. According to these Attorney General guidelines published in the February 1, 2008, edition of the *Texas Register* (33 TexReg 985) "An agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small businesses would not be protective of the health, safety and environmental and economic welfare of the state [footnote deleted]. One example clearly fits within this exception. Agencies may be required to adopt as rules specific fees or specific standards and procedures under a legislative or federal mandate. In such a situation, the mandated language may be considered per se consistent with the health, safety, or environmental and economic welfare of the state and the agency need not consider other regulatory methods."

The amendment of the procedure in the plan of operation used to determine a member company's assessment percentage, in this instance, by eliminating a minimum cap (20 percent of a company's percentage of the net direct statewide property insurance market) and a maximum cap (170 percent of a company's percentage of the same market) on a member company's Association assessment percentage, constitutes proposing as rules specific standards and procedures under a legislative mandate. The legislative mandates are (i) that there be "a plan for the equitable assessment of the members of the Association to defray losses and expenses" as provided in the Insurance Code §2210.152(a)(2)(A); (ii) that Association members be assessed Association operating expenses and/or losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members as provided in the Insurance Code §2210.052(a); and (iii) that the plan of operation include a credit for similar insurance voluntarily written in the catastrophe areas as provided in the Insurance Code §2210.052(d).

Under the Insurance Code §2210.001, the purpose of Chapter 2210 is to provide an adequate market for windstorm and hail insurance in this state. Chapter 2210 "provides a method by which adequate windstorm, hail, and fire insurance may be obtained in certain designated portions of this state." The Insurance Code §2210.051(a) requires all property insurers authorized to engage in property insurance in the state to become members of the Association.

The Insurance Code §2210.152(a)(2)(A) requires the plan of operation to include "a plan for the equitable assessment of the members of the Association to defray losses and expenses." Because all property insurers authorized to engage in property insurance in the state are required to be members, the establishment of an equitable assessment plan requires developing assessment procedures equitable to all members, regardless of size.

The Insurance Code §2210.052(a) specifies that Association members shall be assessed Association operating expenses and/or losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members, and the Insurance Code §2210.052(c) specifies that this proportion shall be determined annually in a manner provided by the plan of operation.

The Insurance Code §2210.052(d) specifies that the plan of operation shall provide that members are entitled to a credit for similar insurance voluntarily written in the catastrophe areas and that the credit should reduce the member company's proportion of participation in the expenses and losses of the Association.

The proposed amendment to §5.4001(c)(2)(B)(1) of the plan of operation to eliminate the use of minimum and maximum caps will allow each member company to receive its full credit for similar insurance voluntarily written in the catastrophe areas, instead of requiring a minimum percentage of 20 percent of a member's percentage of the net direct statewide premiums written. Member companies that have few or no voluntary writings in the catastrophe area will no longer receive a credit limiting their assessment percentage to 170 percent of their percentage of the net direct statewide premiums written. The elimination of the caps for all member companies' assessment percentages is consistent with the requirement in the Insurance Code §2210.152(a)(2)(A) that the plan of operation include a plan for the equitable assessment of the members and the requirement in the Insurance Code §2210.052(d) that the plan of operation include a credit for similar insurance voluntary written in the catastrophe areas. Exempting small and micro businesses from the elimination of minimum or maximum caps may not prove beneficial to small or micro businesses because the assessment per-

centage for a small or micro business would be required to be adjusted upward to a minimum of 20 percent of the company's percentage of the net direct statewide property insurance market if in the future the company's credit for voluntary writings in the catastrophe areas reduced the company's assessment percentage to a lesser percentage than the minimum cap.

Exempting small and micro businesses from the elimination of minimum and maximum caps is not consistent with the legislative mandates (i) that there be "a plan for the equitable assessment of the members of the Association to defray losses and expenses" as provided in the Insurance Code §2210.152(a)(2)(A); (ii) that Association members be assessed Association operating expenses and/or losses in the proportion that the net direct premiums of a member bears to the aggregate net direct premiums of all members as provided in the Insurance Code §2210.052(a); and (iii) that the plan of operation include a credit for similar insurance voluntary written in the catastrophe areas as provided in the Insurance Code §2210.052(d). Accordingly, the costs attributable to this proposal are a result of these legislative mandates. Therefore, in accordance with the Attorney General guidelines issued pursuant to the Government Code §2001.002(g), the legislative mandates "may be considered per se consistent with the health, safety, or environmental and economic welfare of the state and the agency need not consider other regulatory methods."

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on August 5, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, Mail Code 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will consider the adoption of the proposed amendments in a public hearing under Docket No. 2686, scheduled for July 18, 2008, at 9:30 a.m., in Room 100 of the William P. Hobby, Jr., State Office Building, 333 Guadalupe Street, Austin, Texas 78701. Written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendments are proposed pursuant to the Insurance Code Chapter 2210 and §36.001. The Insurance Code §2210.151 requires the Commissioner by rule to adopt the Association plan of operation to provide Texas windstorm and hail insurance in the catastrophe areas. The Insurance Code §2210.152(a)(1) requires that the plan of operation provide for the efficient, economical, fair, and non-discriminatory administration of the Association.

The Insurance Code §2210.054 requires the Association to file an annual statement containing information prescribed by the Department and in the form prescribed by the Department.

The Insurance Code §2210.152(a)(2)(A) requires the plan of operation to include a plan for the equitable assessment of the members of the Association to defray losses and expenses. The Insurance Code §2210.052(a) requires that a member company share in the losses and/or expenses of the Association based on the proportion that the net direct premiums of that member during the preceding calendar year bears to the aggregate net direct premiums by all members of the Association. Under the Insurance Code §2210.052(c), a member company's share of the losses and/or expenses of the Association is required to be determined annually and in the manner provided by the plan of operation. In the determination of a member company's share of the losses and/or expenses of the Association, the Insurance Code §2210.052(d) specifies that members are entitled to a credit for insurance voluntarily written in the catastrophe areas. The Insurance Code §2210.052(d) also requires that the method for calculating the credit be contained in the plan of operation. The Insurance Code §2210.053(b) encourages the Department to develop a program designed to create incentives for insurers to write voluntary windstorm and hail insurance in the catastrophe areas.

Pursuant to the Insurance Code §2210.153(a)(1), the Association may present a recommendation for a change in the plan of operation to the Department. The Insurance Code §2210.153(b) requires proposed changes to the plan of operation to be in writing in the manner prescribed by the Commissioner. The proposed change does not take effect unless adopted by the Commissioner by rule. The Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapter 2210.

§5.4001. Plan of Operation.

(a) - (b) (No change.)

(c) Financial Operation of the Association.

(1) Collection, investment, and allocation of funds.

(A) - (B) (No change.)

(C) Allocation.

(i) Each year the association will prepare a statement of earnings by calendar [~~syndicate~~] year. All premiums written, commissions paid, unearned and earned premiums, loss and loss expenses paid and pending will be charged to the calendar [~~syndicate~~] year. All general expense and interest income received will be charged or credited to the current calendar [~~syndicate~~] year. [~~Syndicate year is determined by the effective date of a policy. For example, policies written in calendar year 1972 with an effective date of 1972 will be charged to the syndicate year 1972. All premiums and loss-loss expense transactions affecting these policies will be assigned to syndicate year 1972. Likewise, all premiums and loss-loss expense transactions in calendar year 1972 affecting policies with an effective date of 1971 will be charged to syndicate year 1971.~~]

(ii) Each company will apply their participation percentage applicable to each calendar [~~syndicate~~] year.

(2) Assessment of members.

(A) (No change.)

(B) Amount of assessment. The board of directors shall determine which members of the association shall participate in any assessment for operating expenses and/or catastrophe losses. This determination shall be computed on a [~~syndicate year basis rather than on a~~]

calendar year basis. The designated members of the association shall participate in any assessment levied in the proportion that the net direct premiums of such member written in this state during the preceding calendar year bears to the aggregate net direct premiums written in this state by all members of the association as furnished to the association by the Department after review of annual statements, other reports, and required statistics; provided, however, that if at the time of such assessment the Department has not furnished to the association information necessary to compute a member's participation during the preceding calendar year, then each member's participation shall be based upon information furnished to the association from the last calendar year in which such information is available and, upon obtaining the necessary information from the Department, the association shall reassess or refund to each member such amounts as are necessary to properly reflect such member's participation; provided, further, that a member shall be entitled to receive the following credit for insurance, similar to catastrophe insurance, written in such catastrophe areas. [area, except that in no event shall the final percentage of participation after application for credit for voluntary writings in the catastrophe area be less than 20% nor more than 190% of the company's percentage of statewide windstorm and hail premiums modified by applicable offset factors, nor more than 170% of the company's percentage of statewide windstorm and hail premium modified by applicable offset factors for policies with inception dates on and after January 1, 1984.]

(i) Participation in the association [Texas Catastrophe Property Insurance Association] for policies after January 1, 1988. Procedure for determining the percent of participation respecting association policies with inception dates on or after January 1, 1988, for members of the association [Texas Catastrophe Property Insurance Association] reflecting credit for voluntary premiums written in the designated areas [area]. (All premiums are for the most recent preceding calendar year ending December 31, as furnished by the Department.) Column 1(a): Statewide net direct premiums for extended coverage and other allied lines. Column 1(b): Statewide net direct premiums for extended coverage and other allied lines portion of the multiple peril line. Column 1(c): Statewide net direct premiums for homeowners and farm and ranch owners. Column 2: The sum of the statewide net direct premiums at 90% of the extended coverage and other allied lines, and 50% of the homeowners and farm and ranch owner's, or such percentage as may be determined in accordance with subsection (a)(2)(i)(III) of this section (90% of Column [column] 1(a) [%+] plus 90% of Column [column] 1(b) plus 50% of Column [column] 1(c)). Column 3: Each company's percentage of the net direct premiums as described in Column [column] 2, which is the basis for indicating normal required participation in the association [Texas Catastrophe Property Insurance Association] prior to credits for voluntary writings in the designated areas [area]. Column 4: Total windstorm and hail premiums in the designated areas [area] (association premiums plus voluntary premiums). Column 5: Normal company quota of total windstorm and hail premiums [:] (Column [column] 3 x Column [column] 4). Column 6: Each company's voluntary writings in the designated areas [area] multiplied by the same percentages as shown in Column [column] 2. Note: Maximum credit shall be limited to company's normal quota. Column 7: Each company's maximum possible allocation after applying credits for voluntary writings (Column [column] 5 minus Column [column] 6). Negative allocation to be shown as zero. Column 8: Percentage participation of each member company in the association [Texas Catastrophe Property Insurance Association], prior to application of offset. Note: The offset figure measures the excess premiums developed by the maximum credit [credits] in Column [column] 6. Column 9: Percentage participation of each member company in the association. [Texas Catastrophe Property Insurance Association prior to application of minimum-maximum factors. Column 10 Assignment after application of 20% minimum or 170% maximum of column 3. Column 11 Net assignment of association. (After application of offset following minimum-maximum limitations).]

[(ii) Participation in Texas Catastrophe Property Insurance Association for policies after January 1, 1983. Procedure for determining the percent of participation respecting association policies with inception dates on and after January 1, 1983, through December 31, 1987, inclusive, for members of the Texas Catastrophe Property Insurance Association reflecting credit for voluntary premiums written in the designated area. (All premiums are for the most recent preceding calendar year ending December 31.) Column 1(a) Statewide direct written premiums for extended coverage from Texas annual statement, page 14, line 2, column 1, and other allied lines from line 3, column 1. Column 1(b) Statewide direct written premiums for the extended coverage and other allied lines portion of the multiple peril line from Texas annual statement, page 14, line 8, column 1. Column 1(c) Statewide direct written premiums for homeowners and farm and ranch owners from Texas annual statement, page 14, line 4, column 1, and line 5, column 1. Column 2 The sum of the statewide direct written premiums at 90% of the extended coverage and other allied lines, and 50% of the homeowners and farm and ranch owners, or such percentage as may be determined in accordance with subsection (a)(2)(i)(III) of this section. (90% of column 1(a)%+ 90% of column 1(b)%+ 50% of column 1(c).) Column 3 Each company's percentage of the net direct premiums as described in column 2, which is the basis for indicating normal required participation in the Texas Catastrophe Property Insurance Association prior to credits for voluntary writings in the designated area. Column 4 Total windstorm and hail premiums in the designated area (association premiums plus voluntary premiums). Column 5 Normal company quota of total windstorm and hail premiums: column 3 x column 4. Column 6 Each company's voluntary writings in the designated area multiplied by the same percentage as shown in column 2 previously. Note: Maximum credit shall be limited to company's normal quota. Column 7 Each company's maximum possible allocation after applying credits for voluntary writings (column 5 minus column 6). Negative allocation to be shown as zero. Column 8 Percentage participation of each member company in Texas Catastrophe Property Insurance Association, prior to application of offset. Note: The offset figure measures the excess premiums developed by maximum credits in column 6. Column 9 Percentage participation of each member company in Texas Catastrophe Property Insurance Association prior to application of minimum-maximum factors. Column 10 Assignment after application of 20% minimum or 190% maximum of column 3 for policies with an inception date during 1983 or 170% maximum of column 3 for policies with inception dates on or after January 1, 1984. Column 11 Net assignment in association. (After application of offset following minimum-maximum limitations.)]

[(iii) Participation in Texas Catastrophe Property Insurance Association for policies after January 1, 1978. Procedure for determining the percent of participation respecting association policies with inception dates on and after January 1, 1978, through December 31, 1982, inclusive, for members of the Texas Catastrophe Property Insurance Association reflecting credit for voluntary premiums written in the designated area. (All premiums are for the most recent preceding calendar year ending December 31.) Column 1(a) Statewide direct written premiums for extended coverage from Texas annual statement, page 14, line 2, column 1. Column 1(b) Statewide direct written premiums for the extended coverage portion of the multiple peril line from Texas annual statement, page 14, line 8, column 1. Column 1(c) Statewide direct written premiums for homeowners and farm and ranch owners from Texas annual statement, page 14, line 4, column 1. Column 2 The sum of the statewide direct written premiums at 90% of the extended coverage and 40% of the homeowners. (90% column 1(a)%+ 90% of column 1(b)%+ 40% of column 1(c).) Column 3 Each com-

pany's percentage of the net direct premiums as described in Column 2, which is the basis for indicating normal required participation in the Texas Catastrophe Property Insurance Association prior to credits for voluntary writings in the designated area. Column 4 Total windstorm and hail premiums in the designated area. (association premiums plus voluntary premiums). Column 5 Normal company quota of total windstorm and hail premiums: column 3 x 4. Column 6 Each company's voluntary writings in the designated area multiplied by the same percentages as shown in column 2 previously. Note: Maximum credit shall be limited to company's normal quota. Column 7 Each company's maximum possible allocation after applying credits for voluntary writings (column 5 minus column 6). Negative allocation to be shown as zero. Column 8 Percentage participation of each member company in the Texas Catastrophe Property Insurance Association, prior to application of offset. Note: The offset figure measures the excess premiums developed by maximum credits in column 6. Column 9 Percentage participation of each member company in Texas Catastrophe Property Insurance Association prior to application of minimum-maximum factors. Column 10 Assignment after application of 20% minimum or 190% maximum of column 3. Column 11 Net assignment in association. (After application of offset following minimum-maximum limitations.)]

Figure: 28 TAC §5.4001(c)(2)(B)(i)

[Figure 28 TAC §5.4001 (c)(2)(B)(iii)]

(ii) [(iv)] The Department shall furnish to the association the amount of net direct premiums of each member company written on property in this state and the aggregate net direct premiums written on property in this state by all member companies during the preceding calendar year as reported by member companies to the Department. Within a reasonable time after the receipt of same from the Department, the association shall notify each member company, in writing, sent by certified mail, the amount of the net direct premiums written on property in this state during the preceding calendar year by the member company to whom notice is given, including the net direct premiums of [on] similar insurance voluntarily written in the catastrophe areas, upon which such company's percentage of participation will be determined. Such notice shall state that such notification, and the content thereof, is an act, ruling, or decision of the association and that the member company to whom such notice is given shall be entitled to appeal therefrom within 30 days from the date of such act, ruling, or decision as shown on said notice in accordance with the Insurance Code §2210.551 [, Article 21.49, §9]. Thereafter, the association shall determine the percentage of participation for each member company in the manner provided in the plan of operation and shall notify each member company thereof, in writing, sent by certified mail. Such notice shall state that such notification, and the content thereof, is an act, ruling, or decision of the association insofar as the mathematical determination of the percentage of participation is concerned and that the member company to whom such notice is given shall be entitled to appeal therefrom within 30 days from the date of such act, ruling, or decision as shown on said notice in accordance with the Insurance Code §2210.551 [, Article 21.49, §9].

(iii) [(v)] To assist the association in determining each member insurer's percentage of participation as soon as possible in the calendar year, each member insurer shall furnish to the association on or before March 1 of each year a copy of its Exhibit of Premiums and Losses (Statutory Page 14 Data) for the State of Texas that is filed annually with the Department as part of the insurer's Texas Fire and Casualty Annual Statement Form 2.

(C) Notice of assessment. Notice of assessment shall be sent to each member, within 30 days of the meeting of the board of directors at which such assessment was levied, by certified mail, return receipt requested, addressed to the office of such member as it appears on the books of the Association. Such notice shall state the member's allocated amount of assessment and shall inform each member of the sanctions imposed by subparagraph (D) of this paragraph for the failure to pay such assessment within the time prescribed by this section. Such notice shall also state that such notification, and the content thereof, is an act, ruling, or decision of the association insofar as the amount of the assessment for such company is concerned and that a member company to whom such notice is given shall be entitled to appeal therefrom within 30 days from the date of such act, ruling, or decision as shown on said notice, in accordance with the Insurance Code §2210.551 [, Article 21.49, §9]; provided, however, that the right of appeal provided for herein shall not include the subject matter of any act, ruling, or decision of the association determining the amount of net direct premiums [premium] of such member company or the percentage of participation for such member company when notice of the amount of such net direct premiums [premium] or such percentage of participation has previously been given by the association in accordance with subparagraph (B)(ii) [(B)(iv)] of this paragraph. The time period for an appeal of an act, ruling, or decision of the association respecting net direct premiums or percentage of participation is computed from the date of the act, ruling, or decision of the association respecting same.

(D) - (E) (No change.)

(3) (No change.)

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803279
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-6327

♦ ♦ ♦

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

The Texas Department of Insurance proposes amendments to §5.4201 and §5.4501 to adopt by reference a proposed new Texas Windstorm Insurance Association (TWIA) endorsement for use with the TWIA Commercial Policy and a proposed update to the existing rules manual for the TWIA to reflect the availability of the proposed new endorsement.

The proposed amendment to §5.4201, relating to Endorsements for Use with TWIA Policy Forms, is necessary to adopt a new optional endorsement, Form No. TWIA-165, Replacement Cost Endorsement, Excluding Roof Coverings, for the TWIA Commercial Policy that provides replacement cost coverage for a commercial building. The proposed new optional endorsement excludes replacement cost coverage for certain items, including the roof and the materials required for the replacement of the roof. The proposed amendment to §5.4501, relating to Manual Rules for the Texas Windstorm Insurance Association, is necessary to update the existing TWIA rules manual to reflect the availability of the new replacement cost endorsement for commercial structures.

Pursuant to the Insurance Code §2210.001, the purpose of the TWIA is to provide windstorm and hail coverage to residents and businesses in the designated catastrophe areas that are unable to obtain such coverage in the voluntary market. The Insurance Code §2210.351 requires that the TWIA file with the Department endorsement forms that the TWIA proposes to use and requires the Commissioner in writing to approve, disapprove, or modify the endorsements. The Insurance Code §2210.207(e) authorizes the Commissioner, after notice and a hearing, to adopt rules to authorize the TWIA to provide actual cash value coverage instead of replacement cost coverage on the roof covering of a building insured by the TWIA. The Insurance Code §2210.008 authorizes the Commissioner to issue any orders, after notice and a hearing, that the Commissioner considers necessary to implement Chapter 2210, the Texas Windstorm Insurance Association Act, including orders regarding TWIA policy and endorsement forms. The Insurance Code §2210.351 also requires the TWIA to file with the Department each modification of the rules manual it proposes to use and authorizes the Commissioner to approve, disapprove or modify in writing each modification of the rules manual submitted.

The TWIA filed a petition (Ref. No. P-0108-03) with the Department on January 22, 2008, requesting that §5.4201 be amended to adopt by reference the proposed new endorsement and also requesting that §5.4501 be amended to adopt by reference a proposed rules manual update that reflects the availability of the new endorsement.

The proposed new optional commercial endorsement (Form No. TWIA-165, Replacement Cost Endorsement, Excluding Roof Coverings) provides replacement cost coverage, excluding roof coverings, for commercial buildings. This proposed new endorsement will be offered to insureds and applicants who have an otherwise insurable commercial structure but are declined replacement cost coverage under Form No. TWIA-164, Replacement Cost Endorsement (Without Deduction for Depreciation) because of the condition of the structure's roof. The proposed new endorsement will allow these insureds and applicants to obtain replacement cost coverage for their building, but not for the roof, until the roof is repaired or replaced. An update to the existing TWIA rules manual is proposed to reflect the availability of the new commercial endorsement (Rules Manual Section II, Policy Forms and Endorsements, subsection b.(15)).

Section §5.4201 is proposed to be amended as follows: new subparagraph (F) is added which proposes to adopt by reference new Form No. TWIA-165, Replacement Cost Endorsement, Excluding Roof Coverings, effective October 1, 2008, and existing subparagraphs (F) - (J) are proposed to be redesignated as subparagraphs (G) - (K).

The amendment to §5.4501 proposes to adopt by reference, effective October 1, 2008, an update to the existing TWIA rules manual to reflect the availability of the new commercial endorsement (Rules Manual Section II, Policy Forms and Endorsements).

No other modifications of existing TWIA endorsements or manual rules are proposed at this time.

Copies of the proposed endorsement and manual rules update may be obtained by contacting the Personal Lines Division, Mail Code 104-1A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701, (512) 322-2266.

FISCAL NOTE. Marilyn Hamilton, Associate Commissioner of the Property and Casualty Program, has determined that for each year of the first five years the proposed endorsement and amendments will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Hamilton has further determined that for each year of the first five years the proposed endorsement and amendments are in effect, the anticipated public benefit will be the availability to TWIA insureds and applicants of replacement cost coverage, excluding the roof and roofing materials, on commercial buildings that would not otherwise qualify for such coverage. Purchase of the new endorsement is at the option of insureds and applicants. The TWIA may offer a commercial policy with the new endorsement to insureds and applicants who are declined replacement cost coverage because of the condition of the structure's roof. The total annual cost of a TWIA Commercial Policy with Form No. 165, Replacement Cost Endorsement, Excluding Roof Coverings, will vary according to the amount of insurance purchased and the TWIA commercial rate in effect at the time of purchase. The proposed amendments will assist the TWIA in continuing to achieve its statutory purpose of providing a method by which adequate windstorm and hail insurance may be made available in certain designated portions of this state.

The persons who are required to comply with the proposed amendments are the TWIA and agents who utilize the TWIA rules manual in writing TWIA coverage. The TWIA will incur costs for printing and distributing the new endorsement; however, the TWIA agreed to bear such costs in filing the petition requesting the adoption of the new endorsement. Under proposed §5.4501, the TWIA will not incur the costs in printing and distributing the updated pages of the rules manual because the rules manual is printed and distributed by ICT Services (ICT) and Wolters Kluwer Financial Services. Agents who utilize the rules manual subscribe to it directly from one of these sources. ICT charges $15 for new subscriptions and $15 to renew a subscription, which includes providing the rules manual and all updates to the rules manual. Wolters Kluwer Financial Services charges $109 for new subscriptions and $85 to renew a subscription, which includes providing the rules manual and all updates to the rules manual. ICT and Wolters Kluwer have informed the Department that they will print and distribute the updated rules manual pages to their subscribers at no additional charge.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an Economic Impact Statement that assesses the potential impact of the proposed rule on small and micro businesses and a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(a)(2) defines small business as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(a)(1)

does not specify a maximum level of gross receipts for a "micro business."

The TWIA does not meet the definition of a "small business" under the Government Code §2006.001(a)(2) or a "micro business" under the Government Code §2006.001(a)(1). Pursuant to the Insurance Code §2210.051, the TWIA is an "association ... composed of all property insurers authorized to engage in the business of property insurance in this state." It is not a corporation, partnership nor sole proprietorship. It is not formed for the purpose of making a profit, but to provide a method by which adequate windstorm and hail insurance may be made available in certain designated portions of this state, as mandated by the Insurance Code §2210.001. Under the Insurance Code §2210.056, the net earnings of the TWIA may not inure to the benefit of private shareholders or individuals, and the assets of the TWIA may not be used other than to satisfy claims on policies, make investments authorized under applicable law, pay reasonable and necessary administrative expenses, and purchase reinsurance or prepare for or mitigate the effects of catastrophic natural events. Under the Insurance Code §2210.452, all premium and other revenue of the TWIA in excess of incurred losses and operating expenses is paid to a catastrophe reserve trust fund or a reinsurance program approved by the Commissioner. Further, under the Insurance Code §2210.056 and §2210.452, on the dissolution of the TWIA, all assets revert to the state. The TWIA is not "independently owned and operated." In addition to not being owned by its members, under the Insurance Code §2210.101 and §2210.102, the TWIA operates with a nine member board of directors responsible and accountable to the Commissioner. The TWIA provides windstorm and hail insurance according to a plan of operation as specified by the Insurance Code §2210.152 and adopted by the Commissioner by rule pursuant to the Insurance Code §2210.151. Further, the TWIA has approximately 150 employees and net receipts of over $6 million. Therefore, pursuant to the Government Code §2006.002(c), an analysis of the economic impact of the proposal on the TWIA is not required.

Agents who write windstorm and hail insurance through the TWIA may meet the definition of "small business" or "micro business" in the Government Code §2006.001. However, as previously noted in the PUBLIC BENEFIT/COST NOTE part of this proposal notice, costs for printing and distributing the new endorsement will be borne by the TWIA. There will be no new costs to an agent whose business organization qualifies as a small or micro business to obtain the updated rules manual because updates to the rules manual are included in the cost of the agent's subscription to ICT Services or Wolters Kluwer Financial Services.

Purchase of the new endorsement is at the option of insureds and applicants. The TWIA may offer the new endorsement, Form No. TWIA-165, Replacement Cost Endorsement, Excluding Roof Coverings, to insureds and applicants who are declined replacement cost coverage because of the condition of the structure's roof. The cost of the commercial policy with the new endorsement to any small or micro business that opts to purchase it will vary based on the amount of insurance purchased and the TWIA commercial rate in effect at the time of purchase.

Based on the foregoing analysis, there is no anticipated adverse economic effect on any small or micro business as a result of the proposal. Therefore, pursuant to the Government Code §2006.002(c), preparation of an Economic Impact Statement and Regulatory Flexibility Analysis is not required.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on August 5, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, Mail Code 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will consider the adoption of the proposed amendments in a public hearing under Docket No. 2687, scheduled for July 18, 2008, at 9:30 a.m., in Room 100 of the William P. Hobby, Jr., State Office Building, 333 Guadalupe Street, Austin, Texas 78701. Written and oral comments presented at the hearing will be considered.

DIVISION 4. ENDORSEMENTS

28 TAC §5.4201

STATUTORY AUTHORITY. The amendments are proposed pursuant to the Insurance Code Chapter 2210 and §36.001. The Insurance Code §2210.207(e) authorizes the Commissioner, after notice and a hearing, to adopt rules to authorize the TWIA to provide actual cash value coverage instead of replacement cost coverage on the roof covering of a building insured by the TWIA. The Insurance Code §2210.008 authorizes the Commissioner, after notice and hearing, to issue any orders which the Commissioner considers necessary to carry out the purposes of the Insurance Code Chapter 2210, including orders regarding maximum rates, competitive rates, and policy forms. The Insurance Code §2210.351(a) authorizes the Commissioner to approve, modify, or disapprove each rules manual and each modification of the rules manual that the TWIA proposes to use. The Insurance Code §2210.351(b) requires that the TWIA file proposed policy and endorsement forms with the Department along with proposed manuals of classifications, rules, rates, rating plans and each modification of those items that the TWIA proposes to use. The Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapter 2210.

§5.4201. Endorsements for Use with TWIA Policy Forms.

The Texas Department of Insurance adopts by reference endorsements for use with the Texas Windstorm Insurance Association (TWIA) Policy Forms. Specimen copies of these endorsements are available from the Texas Windstorm Insurance Association, P.O. Box 99090, Austin, Texas 78709-9090. They are also available from the Personal Lines Division, Mail Code 104-1A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701. The endorsement forms are more specifically identified as follows.

(1) - (2) (No change.)

(3) Endorsements for use with the TWIA Commercial Policy.

(A) - (E) (No change.)

(F) Form No. TWIA-165, Replacement Cost Endorsement, Excluding Roof Coverings, effective October 1, 2008.

(G) [~~(F)~~] Form No. TWIA-176, School Form, effective June 15, 1999.

(H) [~~(G)~~] Form No. TWIA-280, Condominium Property Form--Additional Policy Provisions, effective June 15, 1999.

(I) [~~(H)~~] Form No. TWIA-282, Condominium Property Form--Additional Property Provisions, amended June 15, 1999.

(J) [~~(I)~~] Form No. TWIA-17, Business Income Coverage, effective May 1, 2001.

(K) [~~(J)~~] Form No. TWIA-432, Extension of Coverage--Increased Cost of Construction (Commercial), effective April 1, 2008.

(4) - (5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803208
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-6327

♦ ♦ ♦

DIVISION 6. MANUAL

28 TAC §5.4501

STATUTORY AUTHORITY. The amendments are proposed pursuant to the Insurance Code Chapter 2210 and §36.001. The Insurance Code §2210.207(e) authorizes the Commissioner, after notice and a hearing, to adopt rules to authorize the TWIA to provide actual cash value coverage instead of replacement cost coverage on the roof covering of a building insured by the TWIA. The Insurance Code §2210.008 authorizes the Commissioner, after notice and hearing, to issue any orders which the Commissioner considers necessary to carry out the purposes of the Insurance Code Chapter 2210, including orders regarding maximum rates, competitive rates, and policy forms. The Insurance Code §2210.351(a) authorizes the Commissioner to approve, modify, or disapprove each rules manual and each modification of the rules manual that the TWIA proposes to use. The Insurance Code §2210.351(b) requires that the TWIA file proposed policy and endorsement forms with the Department along with proposed manuals of classifications, rules, rates, rating plans and each modification of those items that the TWIA proposes to use. The Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapter 2210.

§5.4501. Rules for the Texas Windstorm Insurance Association.

The Texas Department of Insurance adopts by reference a rules manual for the Texas Windstorm Insurance Association as amended effective October [~~April~~] 1, 2008. A specimen copy of the rules manual is available from the Texas Windstorm Insurance Association, P.O. Box 99090, Austin, Texas 78709-9090. Copies may also be obtained by contacting the Personal Lines Division, Mail Code 104-1A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803209
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 463-6327

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.22

The General Land Office (GLO) proposes amendments to §15.22, relating to Certification Status of Brazoria County Dune Protection and Beach Access Plan (Plan). The GLO proposes an amendment to §15.22 relating to the certification status of the Plan, adopted on August 9, 1993, and amended by Brazoria County (County), on September 27, 1993. The amendment to §15.22 proposes to certify as consistent with state law the amendments to the Plan that were adopted by Brazoria County on April 8, 2008 by Order No. 39. The amendment includes a variance requested by the County relating to the use of unreinforced fibercrete in four feet by four feet sections in the area 25 feet landward of the north toe of the dune to 200 feet landward of the line of vegetation. Copies of the local government dune protection and beach access plan and any amendments to those plans are available from the Floodplain/911 Administrator Penny Goode, who may be contacted at 451 North Velasco Street, Suite 210, Angleton, Texas 77515 Phone: (979) 864-1295, Fax: (979) 864-1003, Email: pennyg@brazoria-county.com.

BACKGROUND

Pursuant to the Open Beaches Act (Texas Natural Resources Code, Chapter 61), the Dune Protection Act (Texas Natural Resources Code, Chapter 63), and the Beach/Dune Rules (31 TAC §§15.1 - 15.12, and §§15.21 - 15.36), a local government with jurisdiction over Gulf Coast beaches must submit its dune protection and beach access plan and any amendments to such a plan to the GLO for certification pursuant to 31 TAC §15.3(o). The GLO reviews a local beach access and dune protection plan and, if appropriate, certifies that the plan is consistent with state law by adoption or amendment of a rule as authorized in Texas Natural Resources Code §61.011(d)(5) and §61.015(b). The certification by rule reflects the state's approval of the plan, but the text of the plan is not adopted by the GLO as provided in 31 TAC §15.3(o)(4).

A local government requesting certification of a plan or plan amendment that includes a variance of any requirement or prohibition in the GLO's Beach/Dune Rules must submit to the GLO a reasoned justification demonstrating how the variance provides equal or better protection of dunes, dune vegetation, and public access to and use of the public beach than is provided by the Beach/Dune Rules, as required by 31 TAC §15.3(o)(6).

Brazoria County is a coastal county consisting of areas bordering West Bay, Chocolate Bay, and Christmas Bay. The County also borders the Gulf of Mexico to the southeast, extending from the southernmost boundaries of Galveston County at the San Luis Pass south to the northernmost boundary of Matagorda County at Cedar Lake Creek. The Gulf beaches and adjacent areas governed by the Plan are those areas within Brazoria County.

VARIANCE

On April 8, 2008, the Brazoria County Commissioner's Court adopted amendments to its Plan and submitted those amendments to the GLO with a request for certification received by the GLO on April 16, 2008. The County requested that the GLO certify a Plan amendment that includes a variance from the prohibitions and requirements of §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of the Beach/Dune Rules. Section 15.4(c)(8) prohibits the construction of concrete slabs or other impervious surfaces within 200 feet landward of the natural line of vegetation. Section 15.5(b)(3) prohibits a local government from issuing a beachfront construction certificate if the construction includes a proposal to build a concrete slab or other impervious surface within 200 feet landward of the line of vegetation or within the eroding area boundary, whichever distance is greater. Section 15.6(f)(3) applies to construction in eroding areas and provides that a local government may allow a permittee to alter or pave only the ground within the footprint of the habitable structure only if the alteration or paving will be entirely undertaken, constructed, and located landward of 200 feet landward from the line of vegetation or landward of an eroding area boundary established in the local dune protection and beach access plan, whichever distance is greater.

The requested variance establishes special standards providing that: (1) paving or altering the grade below the lowest habitable floor is prohibited in the area between the line of vegetation and 25 feet landward of the north toe of the dune; (2) paving used under the habitable structure and for a driveway connecting the habitable structure and the street is limited to the use of unreinforced fibercrete in four feet by four feet sections, which shall be a maximum of four inches thick with sections separated by expansion joints or pervious materials approved by the Floodplain Administrator, in that area 25 feet from the north toe of the dune to 200 feet landward of the line of vegetation, with driveway width limited to no more width than necessary to service two vehicles; (3) the County shall assess a "Fibercrete Maintenance fee" of $200.00 to be used to pay for the clean-up of fibercrete from the public beaches should the need arise; and (4) reinforced concrete may be used under the habitable structure and for a driveway connecting the habitable structure and the street in that area landward of 200 feet from the line of vegetation.

The reasoned justification submitted by the County in support of its request for the variance authorizing the use of fibercrete in eroding areas within 200 feet seaward of the line of vegetation suggests that it advances the public interest and provides an equal or better level of protection of dunes, dune vegetation, and public access to and use of the beach in that: (1) the ordinance provides financial assurance for debris removal and beach clean-up through imposition of the $200 fibercrete maintenance fee; (2) debris removal and beach clean-up are facilitated by the use of unreinforced fibercrete in large 4 feet by 4 feet sections rather than small pavers, with less sand removed from the beach during clean-up; and (3) prohibiting the use of fibercrete in the area between the line of vegetation and 25 feet from the north toe of the dune ensures that dune hydrology are not adversely affected. Accordingly, the General Land Office finds that the variance requested by the County and the County's reasoned justification for the variance meet the requirements for a variance under §15.3(o)(6) of the Beach/Dune Rules and proposes to certify as consistent with state law the requested variances from §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of the Beach/Dune Rules (relating to Dune Protection Standards, Beachfront Construction Standards, and Concurrent Dune Protection and Beachfront Construction Standards).

FISCAL AND EMPLOYMENT IMPACTS

Ms. Jody Henneke, Deputy Commissioner for the GLO's Coastal Resources Program Area, has determined that for each year of the first five years the proposed amendments are in effect there will be no fiscal implications for the state government as a result of enforcing or administering the proposed amendments. There will be fiscal impact on the local government as a result of enforcing or administering the proposed amendments. The Plan changes authorizing the County to assess a $200 Fibercrete Fee will result in an increase in revenue of approximately $1,000 for each of the first five years the Plan amendment is in effect based on an estimate of five permits issued per year.

Ms. Henneke has also determined that the proposed rule changes will not have an effect on the costs of compliance for small or large businesses. Individuals who are required to comply with the fibercrete ordinance will experience an increase in cost of $200 per permit application if they seek to use fibercrete in the areas permitted by the ordinance.

The GLO has determined a local employment impact statement on these proposed regulations is not required, because the proposed regulations will not adversely affect any local economy in a material manner for the first five years they will be in effect.

PUBLIC BENEFIT

Ms. Henneke has determined the public will benefit from the proposed amendments for the same reasons cited in the County's reasoned justification for the variance. Specifically, the justification by the County supports the finding that the fibercrete ordinance advances the public interest and provides an equal or better level of protection of dunes, dune vegetation, and public access to and use of the beach in that (1) the ordinance provides financial assurance for debris removal and beach clean-up through imposition of the maintenance fee; (2) debris removal and beach clean-up are facilitated by the use of unreinforced fibercrete in large 4 feet by 4 feet sections rather than small pavers, with less sand removed from the beach during clean-up; and (3) prohibiting the use of fibercrete in the area between the line of vegetation and 25 feet from the north toe of the dune ensures that dune hydrology are not adversely affected. In addition, the fibercrete ordinance is consistent with similar ordinances adopted by the City of Galveston and the City of the Village of Jamaica Beach for similar conditions nearby and its certification promotes uniformity in regulations.

CONSISTENCY WITH CMP

The proposal to amend §15.22 concerning Certification Status of Brazoria County Dune Protection and Beach Access Plan is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(J), relating to the Actions and Rules Subject to the CMP. The GLO has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.26, relating to Policies for Construction in the Beach/Dune System, and §501.27, relating to Policies for Development in Coastal Hazard Areas. The amendment will not allow the material weakening of dunes and does not affect the requirement that unavoidable damage to dunes and dune vegetation be compensated. Additionally, the amendment will preserve public beach access by assisting with debris removal in the event of a storm. The GLO has determined that the proposed actions provide equal or better protection for dunes, dune vegetation, and public access to and use of the beach as the GLO's Beach/Dune Rules that the Council has determined to be consistent with the CMP. Consequently, the GLO has determined that the proposed actions are consistent with applicable CMP goals and policies. The proposed amendment will be distributed to Council members in order to provide them an opportunity to provide comment on the consistency of the proposed rule during the comment period.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed amendments to determine whether Texas Government Code, Chapter 2007, is applicable and a detailed takings impact assessment required. The GLO has determined the proposed amendments do not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§61.011, 61.015(b), and 61.022(c), which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and Texas Natural Resources Code §63.121 which provides the Texas General Land Office with authority to adopt rules for protection of critical dune areas..

PUBLIC COMMENT REQUEST

Written comments on the proposed plan amendment and its consistency with the CMP may be submitted to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, Legal Services Division, P.O. Box 12873, Austin, Texas 78711-2873; facsimile number (512) 463-6311; email address walter.talley@glo.state.tx.us. Comments must be received no later than 5:00 p.m., thirty (30) days after the proposed amendments are published.

STATUTORY AUTHORITY

The amendments are proposed under the Texas Natural Resources Code §§61.011, 61.015(b), and 61.022(c), and 61.070, which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and to certify that plans to impose or increase public beach access, parking, or use fees are consistent with state law. In addition, Texas Natural Resources Code §63.121 provides the Texas General Land Office with authority to adopt rules for protection of critical dune areas.

Texas Natural Resources Code §§61.011, 61.015, 61.022, 61.070, and 63.121 are affected by the proposed amendments.

§15.22. Certification Status of Brazoria County Dune Protection and Beach Access Plan.

(a) Brazoria County has submitted to the General Land Office a dune protection and beach access plan which is certified as consistent with state law. The County's [~~county's~~] plan was adopted on August 9, 1993, and amended on September 27, 1993 and April 8, 2008.

(b) The General Land Office certifies as consistent with state law the following variances from §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of this title (relating to Dune Protection Standards, Beachfront Construction Standards, and Concurrent Dune Protection and Beachfront Construction Standards) in the County's plan. The plan establishes special standards providing that:

(1) Paving or altering the grade below the lowest habitable floor is prohibited in the area between the line of vegetation and 25 feet landward of the north toe of the dune.

(2) Paving used under the habitable structure and for a driveway connecting the habitable structure and the street is limited to the use of unreinforced fibercrete in four (4) feet by four (4) feet sections, which shall be a maximum of four inches thick with sections separated by expansion joints, or pervious materials approved by the Floodplain Administrator and the driveway width shall be limited to no more than the width necessary to service two vehicles, in that area 25 feet landward of the north toe of the dune to 200 feet landward of the line of vegetation.

(3) The County shall assess a "Fibercrete Maintenance Fee" of $200.00 to be used to pay for the cleanup of fibercrete from the public beaches should the need arise.

(4) Reinforced concrete may be used under the habitable structure and for a driveway connecting the habitable structure and the street in that area landward of 200 feet from the line of vegetation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 17, 2008.

TRD-200803111
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-1859

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER C. CLAIMS PROCESSING--TRAVEL VOUCHERS

34 TAC §5.22

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Comptroller of Public Accounts proposes the repeal of §5.22, concerning incorporation by reference: "State of Texas Travel Allowance Guide." The existing §5.22 is being repealed so that the content can be updated in a new §5.22 to simplify administration and allow for the implementation of electronic tools that support travel expense reimbursement for state agencies, employees, and other persons. The travel guide has been incorporated by reference as a rule under §5.22 and therefore the guide could not be updated without amending the rule. Much of the travel guide consists of guidelines, examples, illustrations, general discussions, restatements of provisions of Government Code, Chapter 660, and the General Appropriations Act. Because they have been incorporated by reference, any change to the guidelines, examples, or illustrations that may be useful, require the agency to initiate a formal rulemaking process to incorporate the change. The new rule would allow the comptroller to update or add to examples and guidelines without having to formally amend the rule every time updates are needed. These updates ensure that the most current examples and information available to assist agencies with travel expense reimbursement are provided.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that the proposed repeal would benefit the public by clarifying travel provisions for government agencies and their employees. The proposed repeal would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposed repeal may be submitted to Joani Bishop, Manager, Claims Division, P.O. Box 13528, Capitol Station, Austin, Texas 78711.

The repeal is proposed under Government Code, §660.021, which provides the comptroller with the authority to adopt rules for the effective and efficient administration of the travel provisions of the Government Code and the General Appropriations Act.

The proposed repeal implements Government Code, §660.021 and §660.043.

§5.22. Incorporation by Reference: "State of Texas Travel Allowance Guide".

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803115
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §5.22

The Comptroller of Public Accounts proposes new §5.22, relating to State of Texas travel guidance. The new section replaces the existing §5.22, which is being repealed to simplify administration and allow for the efficient updating of guidelines, examples, illustrations, and to allow for the implementation of electronic tools that support travel expense reimbursement for state agencies, employees and other persons. The travel guide has been incorporated by reference as a rule under §5.22 and therefore the guide could not be updated without amending the rule. Much of the travel guide consists of guidelines, examples, illustrations, general discussions, and restatements of provisions of Government Code, Chapter 660, and the General Appropriations Act. Because they have been incorporated by reference, any change to the guidelines or examples that may be useful require the agency to initiate a formal rulemaking process to incorporate the change. The rule would allow the comptroller to update or add to examples and guidelines without having to formally amend the rule every time updates are needed. These updates ensure that the most current examples and information available to assist agencies with travel expense reimbursement are provided.

New §5.22 allows an additional method for determining reimbursable mileage. Under Government Code, §660.043, the number of miles traveled by an employee for state business may be determined by the Texas Mileage Guide or by a point-to-point itemization of miles traveled. While tracking the odometer is a reliable method for calculating miles for reimbursement purposes in most circumstances, new technology makes the calculation simpler and faster. The advent of readily available electronic nationwide mapping services, such as Yahoo maps, Google maps, MapQuest, satellite-based navigation systems, etc., allows individuals to enter starting points and ending points. Based on these inputs, the electronic mapping tools quickly and reliably calculate total mileage providing an alternative to tracking the vehicle's odometer readings. New §5.22 would allow an employee the choice of documenting point-to-point mileage using either the vehicle's odometer reading or by utilizing a readily available electronic mapping service to be selected by each agency.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the new rule is in effect, the public would benefit by clarifying travel provisions for government agencies and their employees. The proposed new rule would have no significant

fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposed new rule may be submitted to Joani Bishop, Manager, Claims Division, P.O. Box 13528, Austin, Texas 78711.

The new section is proposed under Government Code, §660.021, which authorizes the comptroller to adopt rules for the effective and efficient administration of the travel provisions of the Government Code and the General Appropriations Act.

The new section implements Government Code, §660.021 and §660.043.

§5.22. State of Texas Travel Guidance.

(a) General travel information will be maintained on the comptroller's Web site. The information will include procedures, as provided in this rule, Government Code, Chapter 660, and the General Appropriations Act; examples; guidelines that will help support the travel expense reimbursement process for state agencies; and The Texas Mileage Guide providing the number of miles for the shortest or most cost-effective route between two points. Procedures, amounts, timing, limits, required documentation, permissible payees, distinctions among different types of state employees, or any other details concerning travel expense payments or reimbursements by a state agency are governed by Government Code, Chapter 660, the General Appropriations Act, and the rules adopted by the comptroller under Government Code, Chapter 660.

(b) Eligible expenses. A travel expense must be incurred before it is eligible for reimbursement.

(1) For lodging and transportation expenses, proof of payment must be documented to validate that the expenses were actually incurred.

(2) A state employee who receives free transportation or lodging in exchange for points or other non-monetary credits has not incurred an expense for reimbursement purposes.

(c) Erroneous processing and erroneous vouchers.

(1) A state agency or a state employee may not seek reimbursement of a travel expense that the agency or employee knows or reasonably should know is not reimbursable.

(2) The comptroller's omission of a particular travel expense reimbursement as erroneous during a post-payment audit does not prevent the comptroller from designating a similar reimbursement as erroneous in a subsequent audit.

(d) Meal and lodging expenses.

(1) A state employee may be reimbursed for meal and/or lodging expenses that are incurred on a day that the employee conducts state business. The reimbursement is limited to the rates set forth in the General Appropriations Act. The reimbursement limit applies without a carry-over from one day to another.

(2) Meal and lodging expenses incurred at a duty point the night before state business begins are reimbursable.

(3) Meal and lodging expenses incurred more than one night before state business begins are not reimbursable unless traveling to the duty point reasonably requires more than one day or the expenses are incurred to qualify for a discount airfare.

(e) Apartment or house rental expenses.

(1) An apartment or house rental expense may be reimbursed if:

(A) the purpose of the rental is the conservation of state funds; and

(B) the agency reasonably anticipates that the employee will be using the apartment or house while conducting state business throughout the term of the lease.

(2) Application fees and other mandatory costs associated with applying for rental of the apartment or house are reimbursable.

(f) Other reimbursable expenses.

(1) In accordance with Government Code, §660.141, a state employee may be reimbursed for travel expenses incurred while staying extra days at a duty point to qualify for a discount airfare. Such expenses may be reimbursed only if:

(A) the amount of the reimbursement plus the amount of the discount is less than the average coach airfare or the contracted airfare; and

(B) the employing agency determines that the employee's absence for the extra days is not detrimental to the agency.

(2) Incidental expenses.

(A) Pursuant to Government Code, §660.002, a state employee or legislator is entitled to be reimbursed for incidental expenses when they are incurred for a state business reason.

(B) Examples of reimbursable incidental expenses include, but are not limited to: mandatory charges or mandatory service charges; telephone calls; toll charges; parking charges; repair charges for a state-owned vehicle; postage; passport or visa charges required for foreign travel; and currency exchange fees.

(C) Tips or gratuities and excess baggage charges for personal belongings are not reimbursable expenses.

(g) Mileage.

(1) Amount of mileage reimbursement.

(A) The mileage reimbursement rate is established by the legislature in the General Appropriations Act.

(B) With the exception of tolls and parking expenses, the mileage reimbursement rate is inclusive of all expenses associated with the operation of the employee's personal vehicle.

(2) Determination of reimbursable mileage.

(A) The number of miles traveled by an employee for state business may be determined by the Texas Mileage Guide as published on the comptroller's Web site or by using point-to-point itemization.

(B) Point-to-point mileage may be documented by an employee's vehicle odometer reading or by a readily available electronic mapping service such as MapQuest, Yahoo Maps, Google Maps, satellite-based navigation systems, etc., as determined by each agency, institution of higher education, or other entity required to comply with Government Code, Chapter 660.

(h) Travel advance accounts.

(1) A state agency may establish an account for advancing funds to a state employee for the employee's projected travel expenses.

(2) A state agency that declines to establish a travel advance account may not make travel advances.

(3) A travel advance account may not be used for any purpose other than to make travel advances.

(4) A state agency may not issue a travel advance to:

(A) a prospective state employee;

(B) an employee of another state agency unless the employee will be providing services to the agency issuing the travel advance; or

(C) a person who is not a state employee, including a commercial transportation company, a commercial lodging establishment, a credit card issuer, and a travel agency.

(5) The comptroller may not reimburse the travel advance account of a state agency for a travel advance to a state employee who at the time of the advance had been properly reported to the comptroller as being indebted to the state.

(6) Under and over advances.

(A) If a state employee received a travel advance that is less than the reimbursable expenses incurred, the employing state agency may reimburse the employee for the difference.

(B) If an employee received a travel advance that is greater than the reimbursable expenses incurred, then the employee shall promptly reimburse the account for the difference.

(7) A travel advance account may not be reimbursed for a travel expense that would not have been reimbursed if the account had not been used.

(i) Voucher and documentation requirements.

(1) The comptroller requires supporting information and/or documentation to be included on a voucher prior to submission for payment.

(2) Supporting documentation must be sufficient to detail the expenses claimed. Supporting documentation requirements apply to a travel expense that is paid directly and to a travel expense reimbursement made by an agency. The information or documentation required changes periodically; however, it generally includes the following: documentation of employee's headquarters, required itemizations, purpose of trip, and required receipts.

(j) Audits conducted by the comptroller.

(1) Under Government Code, §660.028, the comptroller is required to periodically audit travel vouchers submitted for payment either before or after the comptroller issues a warrant or initiates an electronic funds transfer in response to the voucher. These audits and examinations assist the comptroller's office in determining whether:

(A) the expenses were reasonable and necessary;

(B) the purpose of travel clearly involved state business and was consistent with the agency's legal authority;

(C) the travel conducted and expenses incurred complied with the Travel Regulations Act, comptroller rules, travel provisions of the General Appropriations Act, the Texas Procurement and Support Services contract requirements, and policies and procedures adopted by the comptroller's office; and

(D) the number of individuals traveling for the same or a similar purpose was necessary to perform state business.

(2) The comptroller may question the fiscal responsibility of a payment even if it is technically legal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803116
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

SUBCHAPTER O. UNIFORM STATEWIDE ACCOUNTING SYSTEM

34 TAC §5.200

The Comptroller of Public Accounts proposes amendments to §5.200, concerning state property accounting system. The purpose of the amendments is to improve the accuracy and efficiency of the state property accounting system by updating the definition of capital asset; shortening the timeframe that must elapse before an agency may delete missing property from the state property accounting system; and deleting reference to obsolete provisions regarding reassignable personal property and certain transition provisions which are no longer necessary. The proposed amendments also conform §5.200 to legislative changes made to the state property accounting statutes (Government Code, Chapter 403, Subchapter L) and to related provisions in the surplus and salvage property statutes (Government Code, Chapter 2175). House Bill 2914, 77th Legislature, 2001, amended Government Code, §§403.273, 403.274 and 403.276, regarding documenting the lending of agency property to another agency; the timing of physical inventories; the change of an agency head or property manager; and the reporting of lost, destroyed or damaged property to the appropriate agencies. The amendment also reflect amendments to Government Code, Chapter 2175, as they relate to an exception from the surplus/salvage property statutes relating to recyclable materials (Government Code, §2175.303(2)); institutions or agencies or higher education (Government Code, §2175.304); as well as amendments to Chapter 2175 adding exceptions from the surplus/salvage property statutes as they pertain to surplus computer equipment for the Secretary of State (Government Code, §2175.305), the Office of Court Administration (Government Code, §2175.307), and certain agencies involved in the areas of health, human services, or education (Government Code, §2175.306).

The proposed amendment also updates the names of certain state agencies whose names have been changed since the rule was last amended.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the proposed amendment would benefit the public by improving the accuracy and efficiency of the state property accounting system. The proposed amendment would have no significant fiscal impact on small businesses.

There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposed amendments may be addressed to Darrell Edge, Manager, Fiscal Integrity Division, P.O. Box 13528, Austin, Texas 78711. If a person wants to ensure that the comptroller considers and responds to a comment made about this proposal, then the person must ensure that the comptroller receives the comment not later than the 30th day after the issue date of the *Texas Register* in which this proposal appears.

The amendments is proposed under Government Code, §403.271(b), which requires the comptroller to adopt necessary rules for the implementation of the state property accounting system.

The amendment implements Government Code, §§403.271 - 403.278.

§5.200. State Property Accounting System.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Annual physical inventory--The physical inventory that a state agency must conduct once each year in accordance with this section.

(2) Betterment of personal property--An improvement of personal property that materially increases its serviceability or useful life, or both.

(3) Capital asset--A possession of the state that has [~~a value of at least $1,000 and~~] an estimated useful life of more than one year. [~~The term does not include real property, improvements to real property, or infrastructure.~~]

(4) Capital lease--A lease of personal property under which the lessee substantially assumes the risks and benefits of ownership as specified under generally accepted accounting principles.

(5) Capitalized asset--A capital asset that has a value equal to or greater than the capitalization threshold established for that asset type.

(6) [~~(5)~~] Charitable organization--The term has the meaning assigned by Civil Practice and Remedies Code, §84.003.

(7) [~~(6)~~] Comptroller--The comptroller of public accounts for the State of Texas.

(8) [~~(7)~~] Computer equipment--The equipment includes computer, telecommunications devices and systems, automated information systems, and peripheral devices and hardware that are necessary to the efficient installation and operation of that equipment, but does not include computer software.

(9) [~~(8)~~] Controlled asset--A possession of the state that a state agency has determined must be secured and tracked because of the nature of the possession. The term does not include a capitalized [~~capital~~] asset, real property, an improvement to real property, or infrastructure.

(10) [~~(9)~~] Fiduciary fund--A fund held by a state agency as trustee of the fund. The term includes pension funds and non-expendable trust funds.

(11) [~~(10)~~] Include--A term of enlargement and not of limitation or exclusive enumeration. The use of the term does not create a presumption that components not expressed are excluded.

(12) [~~(11)~~] May not--A prohibition. The term does not mean "might not" or its equivalents.

(13) [~~(12)~~] Personal property--A capital asset not classified as real property [~~or a controlled asset~~].

(14) [~~(13)~~] Proprietary fund--A self-supporting fund whose resources are generated through user charges. The term includes enterprise and internal service funds.

[~~(14) Reassignable personal property--Personal property that retains usage value for the state, continues to be functionally capable of serving a state agency, and is not surplus personal property.~~]

(15) Replacement of personal property--A replacement of an internal or external part of personal property that allows it to complete its normal useful life.

(16) Salvage personal property--Personal property that no longer serves its original purpose because it is depleted, worn out, damaged, consumed, outdated, or obsolete. The term does not include personal property that has a remaining useful life.

(17) State agency--A state governmental entity that manages, administers, or controls personal property.

(18) State employee--An officer or employee of a state agency.

(19) State property accounting system--The [~~personal property~~] fixed asset component of the uniform statewide accounting system.

(20) Supplemental physical inventories--The optional physical inventories that a state agency conducts in addition to the required annual physical inventory.

(21) Surplus personal property--Personal property in the possession of a state agency that is not currently needed by the agency and is not required for the agency's foreseeable needs. The term does not include salvage personal property.

(22) Trust property--Property not owned by the state that a state agency temporarily holds on behalf of the owner and is not used in agency operations.

[~~(b) Controlled assets. The state agency that manages, administers, or controls a possession of the state should use good business practices when determining whether the possession is a controlled asset.~~]

(b) [~~(c)~~] Exemptions.

(1) Equipment and supplies purchased through programs, contracts, or grants with the Department of State Health Services [~~Texas Department of Health~~].

(A) An item of equipment or a supply is exempt from the requirements of subsections (c) - (q) [~~(b) and (d) - (s)~~] of this section if it is:

(i) used to promote and maintain public health;

(ii) is purchased by or for a qualified entity; and

(iii) is purchased through a program, contract, or grant with the Department of State Health Services [~~Texas Department of Health~~].

(B) The exemption ends if the item or supply is returned to the Department of State Health Services [~~Texas Department of Health~~] upon the termination of the applicable program, contract, or grant. When the exemption ends, the formerly exempt equipment

or supply must be reported to the state property accounting system in accordance with the comptroller's requirements.

(C) A state agency that purchases an exempt item of equipment or a supply shall develop and maintain internal control procedures for keeping a complete and accurate inventory of the items exempt under subparagraph (A) of this paragraph.

(D) In this paragraph, "qualified entity" includes an individual, a corporation, a local unit of government, and a state agency.

(2) The Department of Assistive and Rehabilitative Services [~~Texas Rehabilitation Commission and the Texas Commission for the Blind~~].

(A) A material, tool, book, or other necessary apparatus provided to a client by the Department of Assistive and Rehabilitative Services [~~Texas Rehabilitation Commission or the Texas Commission for the Blind~~] is exempt from subsections (c) - (q) [~~(b) and (d)-(s)~~] of this section.

(B) The Department of Assistive and Rehabilitative Services [~~Texas Rehabilitation Commission and the Texas Commission for the Blind~~] shall [~~each~~] develop and maintain internal control procedures for keeping a complete and accurate inventory of the items that are exempt under subparagraph (A) of this paragraph.

(C) The state auditor may request to review an inventory required by subparagraph (B) of this paragraph at any time.

(D) An item that no longer qualifies for an exemption under subparagraph (A) of this paragraph must be added to the state property accounting system.

(3) Items provided to clients of state agencies.

(A) The comptroller may exempt from the reporting requirements of this section a material, tool, book, or other necessary apparatus if the item is provided to a client by a qualifying state agency.

(B) The appropriate state agency shall develop and maintain internal control procedures for keeping a complete and accurate inventory of the items that are exempt under subparagraph (A) of this paragraph.

(C) The state auditor may request to review an inventory required by subparagraph (B) of this paragraph at any time.

(D) An item that no longer qualifies for an exemption under subparagraph (A) of this paragraph must be added to the state property accounting system.

(c) [~~(d)~~] Certification of internal state agencies and reporting state agencies.

(1) General requirement. A state agency must be certified as an internal state agency or a reporting state agency.

(2) Initial certification. A state agency that has not been certified before the effective date of this section must properly complete and submit to the comptroller the form required by the comptroller. The agency must specify on the form whether the agency wants certification as an internal state agency or a reporting state agency. The comptroller shall review the form and consider the agency's ability to comply with this section before certifying the agency.

(3) State agency requests for changes in certification.

(A) A reporting state agency may change its certification to an internal state agency by:

(i) properly completing the form required by the comptroller; and

(ii) obtaining the comptroller's approval of the change.

(B) An internal state agency may change its certification to a reporting state agency by:

(i) properly completing the form required by the comptroller; and

(ii) obtaining the comptroller's approval of the change.

(C) When considering whether to approve or disapprove a state agency's request for a certification change, the comptroller shall:

(i) consider the agency's history of complying or not complying with this section's requirements for the agency's current certification; and

(ii) determine the agency's capability to comply with this section's requirements for the agency's requested certification.

(D) This subparagraph applies if the comptroller receives a state agency's request for a certification change not later than the 30th day before the start of the next fiscal year. If the comptroller approves the change, then the change is effective on the later of:

(i) the first day of the fiscal year following the fiscal year during which the comptroller approves the change; or

(ii) the date the state property accounting system receives a full and accurate reporting from the agency of its property balances as of the end of the fiscal year during which the comptroller approves the change.

(E) This subparagraph applies if the comptroller receives a state agency's request for a certification change during the last 29 days of a fiscal year. If the comptroller approves the change, then the change is effective on the later of:

(i) the first day of the second fiscal year following the fiscal year during which the comptroller receives the request; or

(ii) the date the state property accounting system receives a full and accurate reporting from the agency of its property balances as of the end of the fiscal year following the fiscal year in which the comptroller receives the request.

(4) Certification changes initiated by the comptroller.

(A) The comptroller may change a state agency's certification from a reporting state agency to an internal state agency or vice versa anytime the comptroller determines the change is needed.

(B) If the comptroller changes a state agency's certification under subparagraph (A) of this paragraph, then the change is effective on the date specified by the comptroller.

(5) Criteria for certification as an internal state agency. A state agency may be an internal state agency only if:

(A) the agency determines that it will use the state property accounting system as its own property accounting system; and

(B) the agency agrees to maintain a perpetual inventory.

(6) Criteria for certification as a reporting state agency.

(A) A state agency is a reporting state agency if it:

(i) is not exempt from this section; and

(ii) is not an internal state agency.

(B) A reporting state agency shall modify its [~~personal~~] property accounting system to comply with the comptroller's reporting requirements, as periodically amended.

(C) A reporting state agency shall demonstrate to the comptroller's satisfaction that the agency has disaster recovery capability.

(d) [~~(c)~~] Physical inventories.

(1) Frequency and timing of physical inventories.

(A) Except as provided by subsection (m) [~~(n)~~] of this section, a state agency shall conduct an annual physical inventory of the personal property and trust property in the agency's possession. The agency may choose the date of the inventory.

(B) The comptroller encourages a state agency to conduct each year one or more supplemental physical inventories of the personal property and trust property in the agency's possession.

(2) Requirements for annual physical inventories.

(A) When a state agency conducts an annual physical inventory of the personal property and trust property in the agency's possession, the agency shall:

(i) ensure that each property item is still within the agency's possession;

(ii) determine whether the person who has custody of each property item as indicated on the agency's records still has custody of the item; and

(iii) determine the condition of each property item.

(B) A state agency may use any method for conducting an annual physical inventory that is acceptable to the comptroller.

(C) If the results of a state agency's annual physical inventory vary from the records on the state property accounting system, then the agency shall immediately report the discrepancies to the comptroller through the system. The report must provide a reason for each discrepancy.

(3) Reports to the comptroller about annual physical inventories.

(A) The head of a state agency shall send a report to the comptroller about the agency's annual physical inventory.

(B) The report must contain:

(i) a copy of the results of the inventory; and

(ii) a signed statement that:

(I) provides the date the inventory was conducted;

(II) identifies the individual who the comptroller may contact for information about the inventory;

(III) describes the methods used to conduct the inventory;

(IV) summarizes the values received from the inventory; and

(V) contains the other information required by the comptroller.

(C) Deadline for reports. The head of a state agency shall ensure that the comptroller receives a copy of the results of the agency's inventory and the signed statement not later than the earliest of:

(i) the 45th day after the date the inventory is conducted; or

(ii) the 20th day after the end of the fiscal year for which the inventory is conducted.

(4) Requirements for supplemental physical inventories.

(A) A state agency may use any method for conducting a supplemental physical inventory that is acceptable to the comptroller. Statistical sampling and dollar unit sampling techniques are acceptable if they are properly used and comply with the comptroller's requirements.

(B) A state agency shall maintain in its records the results of each supplemental physical inventory.

(C) If the results of a state agency's supplemental physical inventory vary from the records on the state property accounting system, then the agency should consider the immediate conducting of an annual physical inventory.

(5) Loaned personal property. Personal property that a state agency has loaned to another state agency is the responsibility of the lending state agency for the purpose of this subsection.

(6) Transferred personal property. Personal property[~~, including reassignable personal property,~~] that a state agency has transferred to another state agency is the responsibility of the transferring state agency until the transfer has been completed in accordance with the comptroller's requirements.

(7) Missing, stolen, salvage, or surplus personal property. A state agency must include in a physical inventory the agency's missing, stolen, salvage, or surplus personal property until it has been deleted from the state property accounting system in accordance with this section.

(e) [~~(f)~~] Records and reporting.

(1) Internal state agencies.

(A) An internal state agency shall maintain a perpetual inventory. The agency shall record personal property and trust property on the state property accounting system at the time of acquisition. The information must be recorded in accordance with the comptroller's requirements.

(B) The comptroller shall maintain an internal agency's property records on the state property accounting system.

(2) Reporting state agencies.

(A) A reporting state agency shall report information to the state property accounting system in accordance with the comptroller's schedules, procedures, and classification system. The comptroller may require a reporting state agency to submit information at any time. The comptroller shall notify reporting state agencies in writing about the required frequency of the agencies' reports.

(B) A reporting state agency shall maintain its property records in the manner and format required by this section and the comptroller. The agency shall ensure that its property accounting system is always capable of providing the information required by the state property accounting system.

(3) Group and unit tracking of personal property.

(A) A state agency shall track personal property on a unit basis.

(B) Possessions of the state other than personal property may be tracked on a group basis only if the requirements of subparagraphs (C) and (D) of this paragraph are satisfied.

(C) A state agency may track possessions of the state on a group basis only if all the possessions in the group:

(i) have the same characteristics;

(ii) have the same purchase and in-service dates;

(iii) have the same class code;

(iv) are visually identifiable as logically belonging to the group; and

(v) may be depreciated using the same methods.

(D) Notwithstanding anything in this paragraph, possessions of the state that are purchased with debt financing by the Texas Public Finance Authority may be tracked on a group basis only if all the possessions in the group are included in the same lease supplement.

(4) Missing, stolen, damaged, or destroyed personal property.

(A) Upon receiving a report about stolen, damaged, or destroyed personal property from a head of agency under subsection (f)(1)(C) or (D) [~~(g)(1)(C) or (D)~~] of this section or from a property manager under subsection (g)(2)(B) or (C) [~~(h)(2)(B) or (C)~~] of this section, the comptroller shall forward necessary records about the property to the [~~state auditor and the~~] attorney general.

(B) The attorney general may investigate and take appropriate legal action to recover the value of stolen, damaged, or destroyed personal property. The attorney general shall determine the value of the property to be recovered based on the market value of the property and the degree of responsibility of the person who was entrusted with the property.

(C) A state agency shall [~~may not~~] delete missing personal property from the state property accounting system before two [~~three~~] annual physical inventories have been conducted or two [~~three~~] calendar years have elapsed since it was determined to be missing.

(D) A state agency may delete missing, stolen, damaged, or destroyed personal property from the state property accounting system only in accordance with the comptroller's procedures.

(f) [~~(g)~~] Responsibilities of heads of state agencies.

(1) Care, custody, and control of personal property.

(A) The head of a state agency is responsible for the custody and care of personal property and trust property in the agency's possession. This responsibility does not end when a property manager is designated.

(B) The head of a state agency is responsible for ensuring that the agency maintains adequate inventory controls on personal property and trust property. Upon request, the state auditor may advise and make recommendations to the agency about those controls.

(C) If the head of a state agency has reasonable cause to believe that the agency's personal property or trust property is missing, damaged, or destroyed because of a state employee's negligence, then the head of the agency shall file a report with the comptroller[~~, the state auditor,~~] and the attorney general.

(i) A report to the comptroller must be made immediately and by entering the appropriate disposal code into the state property accounting system.

~~(ii)~~ ~~A report to the state auditor must be made through a deletion request entered into the state property accounting system. A head of agency should transmit to the state auditor by facsimile the appropriate form within 24 hours after entering the deletion request.~~]

(ii) [~~(iii)~~] A report to the attorney general must include the appropriate form. The form must be transmitted to the attorney general by facsimile. The report must be made not later than the fifth working day after reasonable cause for the belief arises.

(D) If the head of a state agency has reasonable cause to believe that the agency's personal property or trust property has been stolen, then the head of agency shall inform the comptroller[~~, the state auditor~~], the attorney general, and law enforcement personnel.

(i) A report to the comptroller must be made immediately and by entering the appropriate disposal code into the state property accounting system.

~~(ii)~~ [~~A report to the state auditor must be made through a deletion request entered into the state property accounting system. A head of agency should transmit to the state auditor by facsimile the appropriate form and police report within 24 hours after entering the deletion request.~~]

(ii) [~~(iii)~~] A report to the attorney general must include the appropriate form. The form must be transmitted to the attorney general by facsimile. The report must be made not later than the fifth working day after reasonable cause for the belief arises.

(iii) [~~(iv)~~] A report to law enforcement personnel must be made not later than the 48th hour after reasonable cause for the belief arises.

(2) Designation, supervision, and training of property managers.

(A) The head of a state agency shall:

(i) designate a property manager for the agency;

(ii) inform the comptroller of the designation by properly completing and submitting the form required by the comptroller; and

(iii) ensure that the property manager receives training about this section and the state property accounting system.

(B) The head of a state agency may designate more than one property manager for the agency only if the comptroller approves.

(C) The head of a state agency may designate one or more alternate property managers for the agency. The head of agency shall inform the comptroller of the designation by properly completing and submitting the form required by the comptroller.

(D) If a state agency's property manager or alternate property manager changes, then the head of the agency shall inform the comptroller of the change by properly completing and submitting the form required by the comptroller.

(E) The head of a state agency shall ensure that the property manager for the agency properly carries out the property manager's duties as required by this section.

(3) Providing receipts. The head of a state agency shall provide the receipt required by subsection (g)(4) [~~(h)(4)~~] of this section if the head of agency is entrusted with personal property or trust property.

(4) Use of personal property or trust property. The head of a state agency may use personal property and trust property only for state purposes.

(5) Change in the head of a state agency.

(A) When the head of a state agency changes, the outgoing head of agency shall complete the form required by the comptroller and deliver the form to the incoming head of agency.

(B) After verifying and signing the form, the incoming head of agency shall send copies of the form to the comptroller [~~and the state auditor~~].

(6) Liability. The head of a state agency is financially liable for the loss sustained by the state if the head of agency is entrusted with personal property or trust property and:

(A) the property disappears because the head of agency fails to exercise reasonable care for its safekeeping;

(B) the property deteriorates because the head of agency fails to exercise reasonable care to maintain and service it; or

(C) the property is damaged or destroyed because of the head of agency's negligent or intentional wrongful act.

(g) [~~(h)~~] Responsibilities of property managers.

(1) Determining the responsibilities of alternate property managers. The property manager of a state agency shall determine the responsibilities of the agency's alternate property managers. The property manager shall ensure that the alternate property managers properly fulfill their responsibilities.

(2) Custody of personal property and trust property.

(A) The property manager of a state agency is the custodian of all personal property and trust property possessed by the agency.

(B) If a property manager has reasonable cause to believe that personal property or trust property is missing, damaged, or destroyed because of a state employee's negligence, then the property manager shall inform the comptroller[~~, the state auditor,~~] and the attorney general. A report to the comptroller must be made in the form and manner required by the comptroller.

(i) A report to the comptroller must be made immediately and by entering the appropriate disposal code into the state property accounting system.

~~*(ii)* A report to the state auditor must be made through a deletion request entered into the state property accounting system. A property manager should transmit to the state auditor by facsimile the appropriate form within 24 hours after entering the deletion request.~~]

(ii) [~~(iii)~~] A report to the attorney general must include the appropriate form. The form must be transmitted to the attorney general by facsimile. The report must be made not later than the fifth working day after reasonable cause for the belief arises.

(C) If a property manager has reasonable cause to believe that the agency's personal property or trust property has been stolen, then the property manager shall inform the comptroller[~~, the state auditor~~], the attorney general, and law enforcement personnel.

(i) A report to the comptroller must be made immediately and by entering the appropriate disposal code into the state property accounting system.

~~*(ii)* A report to the state auditor must be made through a deletion request entered into the state property accounting system. A property manager should transmit to the state auditor by facsimile the appropriate form and police report within 24 hours after entering the deletion request.~~]

(ii) [~~(iii)~~] A report to the attorney general must include the appropriate form. The form must be transmitted to the attorney general by facsimile. The report must be made not later than the fifth working day after reasonable cause for the belief arises.

(iii) [~~(iv)~~] A report to law enforcement personnel must be made not later than the 48th hour after reasonable cause for the belief arises.

(3) Maintaining records. The property manager of a state agency shall maintain the records required by the comptroller and this section.

(4) Entrusting personal property or trust property to other persons.

(A) A property manager may not entrust personal property or trust property to a person unless the person provides a signed, written, and dated receipt to the property manager.

(B) The receipt must contain a statement similar to the following. "I understand that I am financially liable to the state for the disappearance of the personal property or trust property if I fail to exercise reasonable care for its safekeeping; the deterioration of the property if I fail to exercise reasonable care to maintain and service it; and the damage or destruction of the property if it occurs because of my negligent or intentional wrongful act."

(C) A property manager may not entrust personal property or trust property to a person if the property manager knows or reasonably should know that the person will use the property for other than state purposes.

(5) Use of personal property and trust property. A property manager may use personal property and trust property only for state purposes.

(6) Changes in property managers.

(A) When a property manager changes, the outgoing property manager shall complete the form required by the comptroller and deliver the form to the incoming property manager.

(B) After verifying and signing the form, the incoming property manager shall send copies of the form to the comptroller [~~and the state auditor~~].

(7) Liability. A property manager is financially liable for the loss sustained by the state if the property manager is entrusted with personal property or trust property and:

(A) the property disappears because the property manager fails to exercise reasonable care for its safekeeping;

(B) the property deteriorates because the property manager fails to exercise reasonable care to maintain and service it; or

(C) the property is damaged or destroyed because of the property manager's negligent or intentional wrongful act.

(h) [~~(i)~~] Responsibilities of state employees.

(1) Providing receipts. A state employee shall provide the receipt required by subsection (g)(4) [~~(h)(4)~~] of this section if the employee is entrusted with personal property or trust property.

(2) Use of personal property and trust property. A state employee may use personal property [~~and trust property~~] only for state purposes.

(3) Liability. A state employee is financially liable for the loss sustained by the state if the employee is entrusted with personal property or trust property and:

(A) the property disappears because the employee fails to exercise reasonable care for its safekeeping;

(B) the property deteriorates because the employee fails to exercise reasonable care to maintain and service it; or

(C) the property is damaged or destroyed because of the employee's negligent or intentional wrongful act.

(i) [~~(j)~~] Valuation of personal property.

(1) General provision. This subsection governs the valuation of personal property as reported to the state property accounting system.

(2) Newly acquired personal property. The value of newly acquired personal property must be equal to the sum of:

(A) the cost of the property; and

(B) the costs required to place the property into service.

(3) Donated personal property.

(A) The value of personal property acquired through donation must be equal to its fair market value on the date of donation.

(B) The fair market value of donated personal property must be determined through a reasonable market study.

(C) A state agency that conducts a market study shall fully document the methods used to conduct the study. The agency shall keep the documentation in the agency's records in accordance with the comptroller's requirements. The agency shall send a copy of the documentation to the state property accounting system.

(4) Personal property manufactured by the state. The value of personal property manufactured by the state must be equal to the total cost of labor and materials. Overhead costs may be included in the value if the manufacturing state agency determines it would be cost-effective.

(5) Betterments and replacements of personal property.

(A) A state agency shall determine the value of a betterment or replacement of personal property:

(i) immediately following the completion of the betterment or replacement; or

(ii) at the agency's earliest opportunity as deemed appropriate by the agency and the comptroller.

(B) The value of a betterment of personal property must be expensed unless the betterment increases the value or useful life of the property by a material amount [~~at least 25%~~]. If a betterment is not expensed, then the value of the property must be increased on the state property accounting system in accordance with the comptroller's requirements.

(C) The value of a replacement of personal property is equal to the cost of the replacement less the original cost of the part being replaced. The value of the replacement must be expensed unless the replacement materially increases the value or estimated useful life of the property. If a replacement is not expensed, then the value of the property must be increased on the state property accounting system in accordance with the comptroller's requirements.

(D) If a state agency is required to increase the value of personal property on the state property accounting system because of a betterment or replacement, then the agency shall keep documentation in its records that supports the amount of the increase. The agency shall make the documentation available for inspection upon request. The agency may destroy the documentation only in accordance with the comptroller's requirements.

(6) Debt-financed personal property.

(A) In this paragraph, the total principal of debt-financed personal property is equal to the purchase price of the property plus the applicable service charge imposed by the Texas Public Finance Authority.

(B) The acquisition cost of debt-financed personal property other than manufactured items must reflect the total principal of the property and the costs required to place the property into service.

(C) The acquisition cost of debt-financed personal property that has been manufactured should be equal to the total cost of acquiring the property plus the cost of placing the property into service. This includes the principal, interest, finance charges, costs of issuance, and administrative fees.

(7) Leased personal property.

(A) Personal property that a state agency has leased under a capital lease must be valued in accordance with this paragraph.

(B) Subject to subparagraph (C) of this paragraph, the cost of leased personal property is equal to the present value of the minimum lease payments plus the cost of placing the property into service. The cost of the property does not include any costs not paid by the agency.

(C) The cost of leased personal property may not exceed the property's fair market value.

(8) Trade-ins. If a state agency is authorized to trade personal property for other personal property, then the agency must report the trade to the state property accounting system in accordance with the comptroller's requirements.

(9) Condition of personal property. When a state agency reports [~~reassignable,~~] surplus[~~,~~] or salvage personal property to the state property accounting system, the agency must include the condition of the property in the report. The agency should use the categories adopted by the comptroller when reporting the condition of personal property.

(10) Previously depreciated personal property. If a state agency obtains ownership of personal property that was previously purchased with federal funds and depreciated for federal reporting purposes, then the agency shall value the property at its original cost. The previous depreciation has no effect on the value of the personal property for the purposes of the state property accounting system.

(j) [~~(k)~~] Accounting practices.

(1) Depreciation of personal property.

(A) The depreciable personal property of proprietary and fiduciary funds must be depreciated in accordance with generally accepted accounting principles.

(B) An internal state agency shall depreciate personal property that is a general fixed asset by using the straight-line method. The depreciation must be recorded on the state property accounting system on a memorandum basis unless generally accepted accounting principles require depreciation. Regardless of how the depreciation is

recorded, it shall be recorded at the end of each fiscal year unless the comptroller specifies otherwise.

(C) The amount that personal property depreciates over a fiscal year by using the straight-line method is equal to the difference between the property's acquisition cost and its salvage value; divided by the estimated useful life of the property expressed in months [~~years~~].

(D) A state agency shall use the state property accounting system's default value for the estimated useful life of personal property unless the agency documents a different value based on the agency's experience. This subparagraph applies only when a state agency is calculating depreciation for the purpose of recording it on the state property accounting system.

(2) Transfer of personal property between funds.

(A) If a state agency transfers personal property from a proprietary fund to a governmental fund, then a new cost basis must be established for the property in the governmental fund. The new cost basis must be based on the acquisition cost of the property as recorded in the proprietary fund less any accumulated depreciation earned on the property. There is no requirement for the agency to modify the estimated useful life of the property.

(B) If a state agency transfers personal property from a governmental fund to a proprietary or fiduciary fund, then the acquisition cost of the property must be recorded in the proprietary or fiduciary fund. The acquisition cost as recorded in the proprietary or fiduciary fund must be equal to the acquisition cost as recorded in the governmental fund. The estimated useful life of the property must be adjusted to reflect the best estimate of useful life available to the proprietary or fiduciary fund.

(C) If a state agency transfers personal property from a governmental fund to another governmental fund, then the acquisition cost of the property as recorded in the new fund must be the same as the cost recorded in the old fund.

(3) Reporting and reconciliation of personal property inventory balances.

(A) A state agency shall:

(i) report to the state property accounting system general ledger information using generally accepted accounting principles;

(ii) track beginning balances at the beginning of each year; and

(iii) report additions, deletions, and adjustments in personal property throughout the year so that year end balances can be determined.

(B) An internal state agency should reconcile its general ledger balances for personal property to the supporting financial detail in the state property accounting system. The agency should accomplish the reconciliation on a monthly basis at the month-end closing. All adjustments made during the reconciliation should be supported and documented. The agency may destroy the documentation only in accordance with the comptroller's requirements.

(C) A reporting state agency should reconcile its corresponding balances to the detail reported to the state property accounting system on a quarterly basis. Adjustments should be entered not later than the 20th day after the end of the quarter. All adjustments should be supported and documented. The agency may destroy the documentation only in accordance with the comptroller's requirements.

(k) [~~(l)~~] Maintaining records.

(1) Forms. A state agency shall use the forms prescribed by the comptroller when taking any action authorized or required by this section. The comptroller may adopt and modify forms as the comptroller deems necessary.

(2) Loans of personal property.

(A) A state agency may loan [~~that loans~~] personal property to another state agency only if the head of the agency lending the property provides written authorization for the lending. The head of the agency to which the property is lent must execute a written receipt [~~shall document the loan as required by the comptroller~~].

(B) A state agency that loans personal property to another state agency shall document the loan as required by the comptroller.

(C) [~~(B)~~] A state agency that loans personal property to another state agency does not suspend or eliminate its responsibilities toward the property under this section and applicable law.

(3) Transfers of personal property.

(A) A state agency that transfers personal property to another state agency shall comply with the procedures and requirements adopted by the comptroller.

(B) A state agency that receives personal property from another state agency shall comply with the procedures and requirements adopted by the comptroller.

(C) Personal property that is transferred from one state agency to another is in the possession of the transferring agency until the receiving agency properly enters its receipt of the property in the state property accounting system.

(D) A state agency may not transfer property purchased through the master lease financing program administered by the Texas Public Finance Authority unless the authority provides advance approval of the transfer in accordance with the authority's requirements.

[~~(4) Reassignable personal property.~~]

[~~(A) A state agency that has possession of reassignable personal property shall identify the property to the state property accounting system. The system shall then advertise the availability of the property to other state agencies.~~]

[~~(B) A state agency that transfers reassignable personal property to another state agency and the state agency that receives the property shall comply with the comptroller's procedures for the transfer.~~]

[~~(C) This subparagraph applies if a state agency transfers to at least two state agencies reassignable personal property that is tracked on a group basis on the state property accounting system. The transferring state agency shall identify to the system the property that is transferred to each state agency. Each receiving state agency shall record its receipt of the property on the state property accounting system in accordance with subsection (f) of this section.~~]

(4) [~~(5)~~] Surplus and salvage personal property.

(A) A state agency shall comply with applicable law and rules when transferring, selling, or disposing of its surplus or salvage personal property.

(B) When a state agency determines that it possesses surplus or salvage personal property, the agency shall notify the state property accounting system in accordance with the comptroller's requirements.

(C) The notification provided under subparagraph (B) of this paragraph constitutes official notice to the Texas Facilities [~~General Services~~] Commission that the surplus or salvage personal property is available for sale or other disposition.

(D) A state agency may delete surplus or salvage personal property from the state property accounting system in accordance [~~only by requesting the comptroller's approval. An approval request must comply~~] with the comptroller's procedures.

(E) Surplus personal property that has not been reported to the state property accounting system must be added to the system before the property may be deleted from the system.

(F) Salvage personal property shall be removed from the state property accounting system in accordance with the comptroller's requirements.

(G) Each house of the legislature is exempt from the surplus property provisions of Government Code, Chapter 2175 [~~the State Purchasing and General Services Act, Article 9~~], if the rules and regulations of the administration committee of the house has adopted a system for disposing of the property. An agency in the legislative branch shall dispose of its surplus or salvage property under a disposition system established by that agency.

(H) Subparagraphs (A) - (F) of this paragraph do not apply to products and by-products of research, forestry, agriculture, livestock, and industrial enterprises that exceed the quantity required for consumption by the producing state agency if the agency has a continuing and adequate system of marketing research and sales. The deletion of those products and by-products from the state property accounting system must comply with the comptroller's requirements.

(I) State eleemosynary institutions [~~and institutions and agencies of higher learning~~] are exempt from the provisions of Government Code, Chapter 2175 [~~in the State Purchasing and General Services Act, Article 9~~], that relate to the disposition of surplus or salvage property except as provided by other law.

(J) Government Code, Chapter 2175, does not apply to the disposition of certain recyclable materials, including paper, cardboard, aluminum cans, plastics, glass, one-use pallets, used tires, used oil, and scrap metal, where the disposition is not in the best interests of the state or economically feasible.

(K) Institutions or agencies of higher education are exempt from the provisions of Government Code, Chapter 2175, that relate to the disposition of surplus or salvage property:

(i) where the governing board of each university system, institution, or agency of higher education establishes written procedures for the disposition of surplus or salvage property of the system, institution or agency; and

(ii) where the procedures allow for the direct transfer of materials or equipment that can be used for instructional purposes to a public school or school district, or an assistance organization designated by the school district, in accordance with other law.

(L) Government Code, Chapter 2175, does not apply to the disposition of surplus computer equipment:

(i) by the Secretary of State, who shall give preference to transferring the property to counties for the purpose of improving voter registration technology and complying with Election Code, §18.063;

(ii) by a state agency involved in the areas of health, human services, or education, who shall give preference to transfer the property to a public school, school district, or assistance organization specified by the school district, or;

(iii) the Office of Court Administration, who shall give preference to transferring the equipment to a local or state governmental entity in the judicial branch of local or state government.

(l) [~~(m)~~] Inventory control.

(1) Marking of personal property. A state agency shall permanently mark each item of personal property in the agency's possession as property of the State of Texas. The marking is permanent for the purpose of this paragraph if the marking can be removed only through considerable or intentional means. The marking shall be highly visible so that conducting a physical inventory is facilitated.

(2) Property inventory numbers.

(A) A state agency shall assign a unique property inventory number to each item of personal property that is tracked on a unit basis. The number shall be printed on a label. The label shall be attached to the item in a highly visible location so that conducting a physical inventory is facilitated.

(B) A property inventory number may not be reused, even if property has been deleted from the state property accounting system.

(3) Responsibility for securing and tracking personal property. A state agency is responsible for ensuring that its personal property and trust property are tracked and secured in the manner that is most likely to prevent damage to and the theft, loss, or misuse of the property.

(4) Locating personal property. A state agency must know where all of its personal property and trust property is located at all times.

(m) [~~(n)~~] Abolished state agencies.

(1) Application of this subsection. This subsection applies to an abolished state agency only to the extent this section is consistent with the law that abolishes the agency.

(2) Responsibilities of the head of an abolished state agency.

(A) The head of an abolished state agency shall:

(i) conduct a complete and accurate physical inventory of the agency's possessions in accordance with the comptroller's requirements;

(ii) furnish a copy of the inventory to the Texas Facilities [~~General Services~~] Commission not later than the effective date of the abolition; and

(iii) transfer all personal property of the agency to the Texas Facilities [~~General Services~~] Commission in accordance with the comptroller's requirements.

(B) The physical inventory required by subparagraph (A)(i) of this paragraph is in addition to the annual physical inventory required by subsection (d) [~~(e)~~] of this section.

(3) Responsibilities of the Texas Facilities [~~General Services~~] Commission. The Texas Facilities [~~General Services~~] Commission shall care for the personal property transferred to the commission under paragraph (2) of this subsection until the commission distributes or sells the property in accordance with applicable law.

(n) [~~(o)~~] Real property.

(1) Using the state property accounting system to track real property. A state agency may use the state property accounting system to track real property if the agency:

(A) establishes its own coding and accounting structures; and

(B) complies with the comptroller's requirements.

(2) Submitting information to the General Land Office. A state agency may not use the state property accounting system to track real property instead of submitting information about the property to the General Land Office.

(o) [~~(p)~~] Access to the state property accounting system. An individual may have access to the state property accounting system only in accordance with the procedures and security limitations prescribed by the comptroller.

(p) [~~(q)~~] Consequences of violating this section. The comptroller may refuse to draw warrants or initiate electronic funds transfers on behalf of a state agency that fails to comply with this section.

(q) [~~(r)~~] Conflict with federal laws or regulations. If a federal law or regulation conflicts with this section, then the law or regulation prevails over this section to the extent necessary to avoid the conflict.

~~[(s) Transition.]~~

~~[(1) Application of this subsection. This subsection applies to personal property of a state agency only if:]~~

~~[(A) the agency was not required to report the property to the General Services Commission by the State Purchasing and General Services Act, Article 8; and]~~

~~[(B) this section requires the agency to report the property to the state property accounting system.]~~

~~[(2) Deadline for initial reporting of personal property. Notwithstanding anything in subsections (a)-(r) of this section, a state agency shall complete its initial reporting of personal property to the state property accounting system not later than August 31, 1994.]~~

(r) [~~(t)~~] Disposal of computer equipment by charitable organizations.

(1) Application of this subsection. This subsection applies to computer equipment purchased by a charitable organization for $500 or more with funds received from the state through appropriation by the Texas Legislature [~~legislature~~] or by grant or by other means.

(2) General requirements. Except as provided by paragraphs (3) and (4) of this subsection, a charitable organization that purchases computer equipment with funds received from the state may not dispose of or discard the computer equipment before the fourth anniversary of the date the charitable organization purchased that equipment.

(3) Exceptions. This subsection does not prohibit:

(A) the sale or trade of computer equipment; or

(B) the disposal of equipment that is not operational.

(4) Donations to other charitable organizations. A charitable organization may dispose of computer equipment purchased with state funds within the four-year period after the date of purchase by donating the equipment to another charitable organization.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803117
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM
SUBCHAPTER A. GENERAL RULES

34 TAC §7.1

The Comptroller of Public Accounts proposes an amendment to §7.1, concerning general statement of purpose of the Prepaid Higher Education Tuition Board, to incorporate the new prepaid tuition unit undergraduate education program (Texas Tomorrow Fund II). This section is being amended to implement House Bill 3900, 80th Legislature, 2007. House Bill 3900 amends the Education Code, Chapter 54, by adding Subchapter H, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II (codified at Education Code, §§54.751 - 54.778). House Bill 3900 directs the Texas Prepaid Higher Education Tuition Board ("board") to administer the new prepaid tuition unit undergraduate education program. Under the new law, a person may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education. The amendment adds a new subsection (c) to incorporate into the general purpose of the board the responsibility to develop, implement, and administer the new prepaid tuition unit program, and describe the purpose of the program and the subchapters' role in informing the public about the program.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing information on the new prepaid tuition unit undergraduate education program. The proposed amendment would have no significant fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Linda Fernandez, Manager, Texas Tomorrow Funds, Post Office Box 13407, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us.

The amendment is proposed under Education Code, §54.752(b)(1), which authorizes the board to adopt rules to implement the Prepaid Tuition Unit Undergraduate Education Program.

The amendment implements Education Code, §54.752.

§7.1. General Statement of Purpose.

(a) - (b) (No change.)

(c) Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II.

(1) The board develops, implements, and administers the prepaid tuition unit undergraduate education program under Education Code, Chapter 54, Subchapter H.

(2) The prepaid tuition unit undergraduate education program enables individuals to enter into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of one or more tuition units that the beneficiary is entitled to apply to the payment of the beneficiary's undergraduate tuition and required fees at an eligible educational institution.

(3) This subchapter and Subchapter L of this chapter inform the public about the prepaid tuition unit undergraduate education program.

(d) [~~(c)~~] Board. This chapter provides an orderly procedure to accomplish the board's responsibilities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 19, 2008.

TRD-200803162
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

SUBCHAPTER C. BOARD RESPONSIBILITIES

34 TAC §7.21

The Comptroller of Public Accounts proposes an amendment to §7.21, concerning general responsibilities of the Prepaid Higher Education Tuition Board. This section is being amended to implement House Bill 3900, 80th Legislature, 2007. House Bill 3900 amends the Education Code, Chapter 54, by adding Subchapter H, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II (codified at Education Code, §§54.751 - 54.778). House Bill 3900 directs the Texas Prepaid Higher Education Tuition Board ("board") to administer the new prepaid tuition unit undergraduate education program. Under the new law, a person may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education. The amendment incorporates into the general responsibilities of the board additional powers that may be required to develop, implement, and administer the new prepaid tuition unit program, as authorized by Education Code, §54.752. The amendment revises the language regarding contract approval amounts in paragraph (6) to make this paragraph consistent with a recent amendment to §7.33(5) adopted by the board related to delegated responsibilities. The amendment adds new paragraph (7) regarding board authority to approve agreements or other transactions with the United States, state agencies, general academic teaching institutions, two-year institutions of higher education, and local governments. The amendment also adds new paragraph (8) regarding board authority to approve contracts with persons or entities to market and enroll persons in the programs.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing information on the new prepaid tuition unit undergraduate education program. The proposed amendment would have no significant fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Linda Fernandez, Manager, Texas Tomorrow Funds, Post Office Box 13407, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us.

The amendment is proposed under Education Code, §54.752(b)(1), which authorizes the board to adopt rules to implement the Prepaid Tuition Unit Undergraduate Education Program.

The amendment implements Education Code, §54.752.

§7.21. General Responsibilities.

The board shall retain the following responsibilities, all of which expressly are not delegated to the executive director:

(1) - (5) (No change.)

(6) negotiation and execution of purchase, contracts, leases, lease purchases, licenses and agreements involving payments of equal to or more than the amount(s) stated in Government Code, §2254.021(2) [~~$10,000~~]; [~~and~~]

(7) approval of agreements or other transactions with the United States, state agencies, general academic teaching institutions, two-year institutions of higher education, and local governments;

(8) approval of contracts with persons or entities to market and enroll persons in the programs; and

(9) [~~(7)~~] all policy making responsibilities of general applicability, provided that the board may delegate policy making responsibility to the executive director where parameters have been adopted by the board to be followed by the executive director in the exercise of such responsibility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 19, 2008.

TRD-200803163
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

SUBCHAPTER D. EXECUTIVE DIRECTOR

34 TAC §7.33

The Comptroller of Public Accounts proposes an amendment to §7.33, concerning delegated responsibilities of the Prepaid Higher Education Tuition Board that are delegated to the comptroller, as executive director of the board. This section is being amended to implement House Bill 3900, 80th Legislature, 2007, to incorporate additional responsibilities necessary or proper to administer the new prepaid tuition unit undergraduate education program (Texas Tomorrow Fund II). House Bill 3900 amends the Education Code, Chapter 54, by adding Subchapter H, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II (codified at Education Code, §§54.751 - 54.778). House Bill 3900 directs the Texas Prepaid Higher Education Tuition Board ("board") to administer the new prepaid tuition unit undergraduate education program. Under the new law, a person may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education. The amendment incorporates into the delegated responsibilities of the board additional powers outlined in Education Code, §54.752, which may be required by the executive director to implement the new prepaid tuition unit undergraduate education program. The amendment adds new paragraph (7) authorizing the executive director to negotiate agreements or other transactions with the United States, state agencies, general academic teaching institutions, two-year institutions of higher education, and local governments. Proposed new paragraph (8) authorizes the executive director to appear before governmental agencies. Proposed new paragraph (9) authorizes the executive director to engage the services of private consultants, actuaries, trustees, records administrators, managers, legal counsel, and auditors for administrative or technical assistance. Proposed new paragraph (10) authorizes the executive director to solicit and accept on behalf of the board gifts, grants, loans, and other aid from any source or participate in any other way in any government program to carry out this chapter. Proposed new paragraph (11) authorizes the executive director to purchase liability insurance covering the board and employees and agents of the board.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing information on the new prepaid tuition unit undergraduate education program. The proposed amendment would have no significant fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Linda Fernandez, Manager, Texas Tomorrow Funds, Post Office Box 13407, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us.

The amendment is proposed under Education Code, §54.752(b)(1), which authorizes the board to adopt rules to implement the Prepaid Tuition Unit Undergraduate Education Program.

The amendment implements Education Code, §54.752.

§7.33. Delegated Responsibilities.

Authority to act in the following areas is delegated to the executive director by the board:

(1) - (5) (No change.)

(6) to authorize a refund, change of beneficiary, conversion to another plan and assess fees as specified by the board or consistent with rules and policies adopted by the board; [~~and~~]

(7) to negotiate agreements or other transactions with the United States, state agencies, general academic teaching institutions, two-year institutions of higher education, and local governments;

(8) to appear on his or her own behalf or on behalf of the board before governmental agencies;

(9) to engage the services of private consultants, actuaries, trustees, records administrators, managers, legal counsel, and auditors for administrative or technical assistance;

(10) to solicit and accept on behalf of the board gifts, grants, loans, and other aid from any source or participate in any other way in any government program to carry out this chapter;

(11) to purchase liability insurance covering the board and employees and agents of the board; and

(12) [~~(7)~~] to perform such other duties as specified by the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 19, 2008.

TRD-200803164
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

SUBCHAPTER I. REFUNDS, TERMINATION

34 TAC §7.82

The Comptroller of Public Accounts proposes an amendment to §7.82, concerning termination of prepaid tuition contract. The proposed amendment deletes from subsection (d) an obsolete provision prohibiting the purchaser of a prepaid tuition contract that terminated automatically as provided by Education Code §54.631(b) from receiving a refund. This provision was adopted to comply with a federal law that is no longer in effect.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the proposed amendment would benefit the public clarifying the procedures relevant to certain refund request. The proposed amendment would have no significant fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendment may be submitted to Linda Fernandez, Manager, Texas Tomorrow Funds, Post Office Box 13407, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us.

The amendment is proposed under Education Code, §54.618(b)(2), which gives the board the authority to adopt rules to implement this subchapter.

The amendment implements Education Code, §54.632(c) and §54.632(b), which requires the board to determine the method by which the amount of the refund is calculated and provides that the person named in the contract is entitled to a refund on termination of the contract.

§7.82. Termination of Prepaid Tuition Contract.

(a) The prepaid tuition contract shall be terminated automatically:

(1) if the board determines that a purchaser has misrepresented residency, age, or other information required by the board in connection with the purchase of a contract; or

(2) upon failure to pay any amounts due under the prepaid tuition contract prior to the expiration of any applicable grace periods.

(b) At its option, a purchaser may voluntarily terminate a prepaid tuition contract upon submission of a written request, provided the beneficiary is under 18 years of age and has not graduated from high school or attained high school equivalency certification. Termination shall be effective 30 days after receipt of such request by the board. The sum of payments made by the purchaser under the prepaid tuition contract, less a cancellation fee, may be refunded to the purchaser, subject to the limitations set forth in §7.81 of this title (relating to Refunds), or the purchaser may transfer any benefits under such contract to another qualified beneficiary under a prepaid tuition contract.

(c) If the beneficiary is at least 18 years of age, or has graduated from high school or attained high school equivalency certification, either the purchaser or the beneficiary may terminate the prepaid tuition contract.

(d) A prepaid tuition contract terminates automatically on the tenth anniversary of the date the beneficiary is projected to graduate from high school. Time spent as an active duty member of the United States armed services shall toll the ten-year anniversary period. [~~No refunds shall be given after the expiration of the ten-year anniversary period.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803118
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

SUBCHAPTER L. PREPAID TUITION UNIT UNDERGRADUATE EDUCATION PROGRAM: TEXAS TOMORROW FUND II

34 TAC §§7.121 - 7.145

The Comptroller of Public Accounts proposes new §§7.121 - 7.145, concerning implementation of the new prepaid tuition unit undergraduate education program (Texas Tomorrow Fund II). The new sections will be under new Subchapter L, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II. The new sections implement House Bill 3900, 80th Legislature, 2007. House Bill 3900 amends Education Code, Chapter 54, by adding Subchapter H, Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund II (codified in Education Code, §§54.751 - 54.778). House Bill 3900 directs the Texas Prepaid Higher Education Tuition Board ("board") to administer the new prepaid tuition unit undergraduate education program. Under the new law, a person may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education.

New §7.121 addresses the application of the rules. The new section provides that the prepaid tuition unit undergraduate education program is being established to enable individuals to enter into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of tuition units that the beneficiary will be able to redeem for the payment of all or a portion of the beneficiary's undergraduate tuition and required fees at an eligible educational institution.

New §7.122 outlines definitions that are applicable to the program, including among others, definitions of eligible educational institution, tuition unit, Refund Value, Reduced Refund Value, Transfer Value and three-year holding period. As provided by House Bill 3900, eligible educational institutions include general academic teaching institutions, two-year institutions of higher education, private or independent institutions of higher education, or accredited out-of-state institutions of higher education, as defined under Education Code §61.003 and §54.751.

New §7.123 provides that the program is intended to meet the requirements of Internal Revenue Code, §529 as a qualified tuition program.

New §7.124 addresses the purchase of tuition units, types of tuition units (Types I, II and III), assigned value and price of the units.

New §7.125 describes the redemption of tuition units, providing that when a beneficiary under a prepaid tuition contract redeems tuition units to pay costs of tuition and required fees, the board will apply money from the Texas Tomorrow Fund II, in the amount provided by Education Code, §54.765, to pay all or the applicable portion of the costs of the beneficiary's tuition and required fees at the eligible educational institution in which the beneficiary enrolls. Consistent with House Bill 3900, the section provides that tuition units must be held for at least three years before being redeemed to pay for tuition and required fees.

New §7.126 outlines the requirements of a prepaid tuition unit contract required be completed to enroll in the program.

New §7.127 describes the requirements to be a purchaser and beneficiary under the program. Consistent with House Bill 3900, the section provides that at the time the purchaser enters into a prepaid tuition contract, the beneficiary of the contract must be a resident of this state or a nonresident who is the child of a parent who is a resident of this state.

New §7.128 addresses contract payments. The section provides that payments under prepaid tuition contracts may be made in single or periodic Pay-As-You-Go payments, or under an installment plan, or both. The section also provides that installment payments will include an implied interest component at a rate set by the board to ensure the actuarial soundness of the fund.

New §7.129 addresses the deferred use of prepaid credit hours.

New §7.130 outlines the requirements to change a beneficiary.

New §7.131 describes purchaser obligations and requests.

New §7.132 provides that nothing in these rules should be construed as a promise or guarantee that a beneficiary will be admitted to any public or private institution of higher education, allowed to continue enrollment at a public or private institution of higher education, or allowed to graduate from a public or private institution of higher education.

New §7.133 describes the circumstances for contract termination.

New §7.134 describes circumstances of default and delinquency conversion. The section provides that an account is subject to a late payment penalty for payments not received within 15 days of the payment due date. The section provides further that any refund in the event of a default shall be limited to the Reduced Refund Value.

New §7.135 describes the parameters for obtaining a refund on an unused or terminated tuition contract. The section provides generally that if an account is held for three or more years, a purchaser is entitled to a refund of the Refund Value of the account (includes some earnings). If a purchaser cancels the prepaid tuition contract within 3 years of the first payment due date, the purchaser may be entitled to a Reduced Refund Value (no earnings with the refund), unless special circumstances apply.

New §7.136 addresses payments to eligible educational institutions upon redemption of tuition units.

New §7.137 describes transfers among Internal Revenue Code, §529, qualified tuition programs. The section provides that a purchaser may transfer money between a prepaid tuition account and an account under another Internal Revenue Code, §529, plan established by this state or by another state or other authorized entity in accordance with Internal Revenue Code, §529, and that the value of the account at the time of transfer is an amount defined as the Transfer Value less any fees due and payable under the contract.

New §7.138 outlines recordkeeping requirements for rollover contributions from other Internal Revenue Code, §529, programs.

New §7.139 provides that the board will administer the Texas Tomorrow Fund II in a manner that is sufficiently actuarially sound to pay the costs of program administration and operations and to meet the obligations of the program. The proposed new rule also provides that the board may adjust the terms of subsequent prepaid tuition contracts as necessary to ensure the actuarial soundness of the fund.

New §7.140 provides that on the request of the comptroller as the comptroller considers necessary to ensure the actuarial soundness of the fund, the board may temporarily suspend new enrollment in the program. The proposed new rule provides further that if the comptroller determines that the program is financially infeasible, the comptroller will notify the governor and the legislature and recommend that the program be modified or terminated.

New §7.141 addresses the effect of program termination on an existing contract.

New §7.142 outlines the requirement for and components of an annual statement for the purchaser regarding the status of the purchaser's prepaid tuition contract.

New §7.143 describes the Texas Save and Match program under which money paid by a purchaser under a prepaid tuition contract may be matched with contributions made by another person or entity to the Texas Save and Match program and used to purchase additional tuition units on behalf of the beneficiary. Contributions may also be matched with any money appropriated by the legislature for the Texas Save and Match program and used to purchase additional tuition units on behalf of certain beneficiaries.

New §7.144 allows gift contributions to be made, and provides that a person or entity may purchase tuition units for a beneficiary designated in an existing prepaid tuition contract by making a gift contribution.

New §7.145 describes marketing considerations, and provides that the program will be marketed in a manner that promotes the participation goals and targets of the most recent revision of "Closing the Gaps," the state's master plan for higher education.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rules will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be in providing information on the new prepaid tuition unit undergraduate education program. The proposed rules would have no significant fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the proposal may be submitted to Linda Fernandez, Manager, Texas Tomorrow Funds, Comptroller of Public Accounts, Post Office Box 13407, Capitol Station, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us.

The new sections are proposed under House Bill 3900, 80th Legislature, 2007, which requires the board to administer the prepaid tuition unit undergraduate education program, and Education Code, §54.752(b)(1), which authorizes the board to adopt rules to implement the program.

The new sections implement Education Code, Chapter 54, Subchapter H.

§7.121. Application.

(a) This subchapter applies to prepaid tuition contracts under the prepaid tuition unit undergraduate education program (Texas Tomorrow Fund II) to enable individuals to enter into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of one or more tuition units that the beneficiary is entitled to apply to the payment of the beneficiary's undergraduate tuition and required fees at an eligible educational institution.

(b) Applications shall be made available through the Prepaid Tuition Unit Undergraduate Education Program, Office of the Comp-

troller of Public Accounts, P.O. Box 13407, Austin, Texas 78711-3407; 111 East 17th Street, Room 1114, Austin, Texas 78711-1440, or by calling toll-free at 1-800-445-4723 (GRAD), or as otherwise provided by the board on the board's Internet web site.

(c) The rights of purchasers and beneficiaries are subject to the provisions of this subchapter, Education Code, Chapter 54, Subchapter H, Internal Revenue Code, §529, and the terms and conditions of the prepaid tuition contract. To the extent of irreconcilable conflict, the provisions of Internal Revenue Code, §529; Education Code, Chapter 54, Subchapter H; and this subchapter prevail over the prepaid tuition contract. Any amendment to Internal Revenue Code, §529; Education Code, Chapter 54, Subchapter H; or this subchapter that would apply to a prepaid tuition contract will automatically constitute an amendment to the prepaid tuition contract.

§7.122. Definitions.

The following words, terms, and phrases, when used in this subchapter, shall have the following meanings:

(1) "Accredited out-of-state institution of higher education" means a public or private institution of higher education that:

(A) is located outside this state; and

(B) is accredited by a recognized accrediting agency.

(2) "Beneficiary" means the person designated under a prepaid tuition contract as the person entitled to apply one or more tuition units purchased under the contract to the payment of the person's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education.

(3) "Board" means the Prepaid Higher Education Tuition Board.

(4) "Eligible educational institution" means a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education, that qualify as eligible educational institutions under Internal Revenue Code, §529.

(5) "Enrollment period" means the period established by the board during which a purchaser may enter into a contract with the board to purchase tuition units. The initial enrollment period is September 1 through the end of February. For beneficiaries who are newborn infants under one year of age at the time of enrollment, the initial enrollment period will be extended to cover the period of September 1 through July 31. These enrollment periods will apply annually thereafter subject to change by the board.

(6) "First payment due date" means the date the first payment is due after enrolling in the program and establishing a new prepaid tuition contract. The first payment due date will be specified in the prepaid tuition contract, and shall initially be established as May 1st. The first payment due date serves as the anniversary date for establishing the three-year holding period. The first payment due date may be changed subsequently by the board for future enrollment periods.

(7) "Fund" means the Texas Tomorrow Fund II.

(8) "General academic teaching institution" has the meaning assigned by Education Code, §61.003, except that the term does not include a public state college.

(9) "Market value" means an amount equal to the total purchase price of any unused tuition units, plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns).

(10) "Matriculation" means enrollment as a member of the student body at an eligible educational institution.

(11) "Paid in full" means that all the required payments for the tuition units and any assessed fees under the prepaid tuition contract have been received and credited to the account.

(12) "Pay-As-You-Go" means purchasing tuition units at the price in effect for that type of tuition unit on the day payment is received for the tuition unit. Pay-As-You-Go includes paying for tuition units with a lump sum payment or multiple lump sum payments, without being obligated to pay for any additional tuition units.

(13) "Plan manager" means a professional investment manager that is under contract with the board to serve as a plan administrator and to invest the assets of the fund on behalf of the board.

(14) "Prepaid tuition contract" means a contract under which a person purchases from the board on behalf of a beneficiary one or more tuition units that the beneficiary is entitled to apply to the payment of the beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education.

(15) "Prepayment" means payment of the balance due or a portion of the balance due under a prepaid tuition contract, ahead of the schedule provided in the contract.

(16) "Private or independent institution of higher education," "public junior college," "public state college," "public technical institute," and "recognized accrediting agency" have the meanings assigned by Education Code, §61.003.

(17) "Program" or "Plan" means the prepaid tuition unit undergraduate education program. The board may select a different name for the program for marketing purposes.

(18) "Purchaser" means a person who enters into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of one or more tuition units.

(19) "Redemption" means the exchange of one or more tuition units to pay costs of tuition and required fees at an eligible educational institution.

(20) "Reduced Refund Value" means the lesser of:

(A) the amount paid by the purchaser or other contributor to purchase any unused tuition units under the contract on behalf of the beneficiary; or

(B) the current market value of the invested payments or contributions for any unused tuition units, as determined by the plan manager. Reduced Refund Value does not include any state provided or procured matching contributions or any earnings on state provided or procured matching contributions.

(21) "Refund Value" means an amount equal to the total purchase price of the unused tuition units to be refunded from the account, plus annual net earnings on the contributions made to the account to purchase the tuition units that are being refunded (including any negative returns), with the earnings rate to be set by the board at a rate that is up to two percent less than the actual investment return for the fund for each of the years the contract is in effect, provided that in no event shall the annual net earnings on the contributions ever exceed five percent annually, and provided further that for any year in which the investment return does not support payment of any earnings, the board may elect not to credit and pay any earnings on the contributions, to preserve the actuarial soundness of the fund. Refund Value

does not include any state provided or procured matching contributions or any earnings on State provided or procured matching contributions.

(22) "Required fee" means a fee, other than a laboratory fee for a specific course, that is charged by a public or private institution of higher education to all students at the institution who are not exempt from the fee. For purposes of this subdivision, a fee is a required fee only to the extent that the fee is considered a qualified higher education expense under Internal Revenue Code, §529. Required fees are generally those fees imposed on all students as a condition of enrollment. Required fees do not include fees such as equipment usage fees required for particular courses, charges for room and board, book costs, or any optional fees.

(23) "Sales period" means the year long period from September 1 through August 31 during which a purchaser who has established a prepaid tuition contract may make purchases under the contract at the price(s) established under the contract, or at the price established for tuition units applicable to the sales period if additional tuition units are purchased during the sales period.

(24) "Three-year holding period" means the period of time that must transpire before a beneficiary or purchaser may redeem a tuition unit to pay for qualified higher education expenses, as provided under §7.125(g) of this title (relating to Redemption of Tuition Units).

(25) "Transfer value" means the value of the prepaid tuition contract at the time of transfer, that is the lesser of:

(A) an amount equal to the cost, at the time of the transfer, of the tuition and required fees that would be covered by redemption of the number and type of tuition units to be transferred from the account (but not including any units resulting from any State provided or procured matching funds) if the beneficiary were redeeming the units at a general academic teaching institution or two-year institution of higher education as follows:

(i) for a Type I unit, at the general academic teaching institution that, in the sales year in which the unit was purchased, had the highest tuition and required fee cost;

(ii) for a Type II unit, at a general academic teaching institution that, in the sales year in which the unit was purchased, had tuition and required fee cost at the weighted average; and

(iii) for a Type III unit, at a two-year institution of higher education that, in the sales year in which the unit was purchased, had tuition and required fee cost at the weighted average; or

(B) an amount equal to the current market value of the unused tuition units to be transferred from the account, which is an amount equal to the total purchase price of the unused tuition units to be transferred from the account (but not including any state provided or procured matching contributions), plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns), but not including any earnings on state provided or procured matching contributions, as determined by the plan manager.

(26) "Tuition" means the charges imposed by a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education, on undergraduates as a condition of enrollment, which are identified by such institution as tuition.

(27) "Tuition unit" means a portion of the cost of undergraduate resident tuition and required fees that may be prepaid, whose assigned value, when used to pay the cost of tuition and required fees at an eligible educational institution, is equal to:

(A) for a Type I tuition unit, one percent of the cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by the general academic teaching institution with the highest such tuition and fee costs for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(d);

(B) for a Type II tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by general academic teaching institutions for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(e); or

(C) for a Type III tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by two-year institutions of higher education for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(f).

(28) "Two-year institution of higher education" means a public junior college, a public state college, and a public technical institute, as those terms are defined in Education Code, §61.003.

(29) "Weighted average" with respect to tuition and required fees means:

(A) for Type II tuition units, a weighted average cost for undergraduate resident tuition and required fees of general academic teaching institutions for the applicable academic year, computed by the method specified in Education Code, §54.753(e); and

(B) for Type III tuition units, a weighted average cost for undergraduate resident tuition and required fees of two-year institutions of higher education for the applicable academic year, computed by the method specified in Education Code, §54.753(f).

§7.123. Tax Exempt Status Requirements.

(a) The provisions of this section are intended to meet the requirements of Internal Revenue Code, §529.

(b) A payment of an amount due to the fund for a prepaid tuition contract must be made in cash or cash equivalent. A person may not make a payment to the fund (regardless of whether such payment is a direct purchase, gift, contribution under the Texas Save & Match program, or other payment) to the extent that any such payment with respect to a beneficiary, when aggregated with the other Internal Revenue Code, 529 Plans for such beneficiary, would exceed the contribution limits of Internal Revenue Code, §529.

(c) The plan manager will monitor contributions to and withdrawals from the fund and any account within the fund to ensure that any applicable limits on contributions or withdrawals are not exceeded.

(d) The plan manager shall maintain a separate accounting for each beneficiary.

(e) The plan manager shall determine the earnings portion of each distribution, if any, in accordance with methods that are consistent with Internal Revenue Code, §529.

(f) The plan manager shall report the earnings portion of any distribution or refund on a statement to the purchaser or other distributee as appropriate, and to the Secretary of the United States Treasury, as may be required by the Internal Revenue Code, §529.

(g) The purchaser and beneficiary under the prepaid tuition contract, and any other contributor, may not:

(1) control or direct the investment of payments under the contract or any earnings of the fund; or

(2) use any interest in the contract as security or collateral for a loan or other obligation.

(h) The board and plan manager shall make such reports as the Secretary of the United States Treasury may require to maintain compliance with Internal Revenue Code, §529.

(i) Policies and procedures. As authorized under Education Code, Chapter 54, Subchapters F, G, and H, the board may adopt any policy or procedure, and such policy and procedure automatically amends each outstanding prepaid tuition contract, as necessary for:

(1) the prepaid tuition contract to obtain or maintain qualification as a qualified tuition program under Internal Revenue Code, §529;

(2) purchasers and beneficiaries to obtain and maintain the federal income tax benefits or favorable treatment that is provided by Internal Revenue Code, §529; or

(3) the prepaid tuition contract to obtain or maintain exemption from registration under federal securities law. If outstanding prepaid tuition contracts are automatically amended as a result of this rule, purchasers will be notified of the amendment through the Internet web site of the program.

§7.124. Prepaid Tuition Units: Purchase; Assigned Value; Types; Price.

(a) Under the program, a purchaser may prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at an eligible educational institution by entering into a prepaid tuition contract with the board to purchase one or more tuition units of a type described by this section at the applicable price established by the board for that type of unit for the year in which the unit is purchased.

(1) The portion of the beneficiary's undergraduate tuition and required fees for which a tuition unit may be redeemed is assigned to the tuition unit at the time of purchase.

(2) Tuition unit(s) may be redeemed to pay that portion of the tuition and fees at the general academic teaching institution or two-year institution of higher education in any academic year in which the unit is redeemed in accordance with this subchapter.

(3) The purchaser may purchase one type of unit or a combination of two or three types of units.

(b) The assigned value of a tuition unit, purchased as provided by this section, when used to pay the cost of tuition and required fees, is equal to one percent of the amount necessary for the academic year in which the unit is redeemed to cover the applicable cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester credit hours as follows:

(1) for a Type I tuition unit, the cost of undergraduate resident tuition and required fees charged by the general academic teaching institution with the highest such tuition and fee costs, determined as provided by subsection (d) of this section;

(2) for a Type II tuition unit, the weighted average undergraduate resident tuition and required fees charged by general academic teaching institutions, determined as provided by subsection (e) of this section; and

(3) for a Type III tuition unit, the weighted average undergraduate resident tuition and required fees of two-year institutions of higher education, determined as provided by subsection (f) of this section.

(c) Each year, the board will establish the price at which each type of tuition unit may be purchased during the next sales period and the percentage of the total cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester credit hours for which each type of tuition unit may be redeemed at each general academic teaching institution and two-year institution.

(1) The percentage will be based on the total cost of required tuition and fees at a particular general academic teaching institution or two-year institution of higher education in relation to the amount determined for the institution with the highest cost or weighted average cost, as applicable.

(2) The purchase price established for each type of unit will be equal to the applicable cost of tuition and required fees as determined under this section for the most recent academic year that began before the beginning of the sales period.

(3) The sales period to which those prices apply expires on the first anniversary of the date the units become available for purchase at the prices established for that year.

(4) Revisions to the purchase price established for each type of unit will be published in the *Texas Register* and on the board's Internet web site and shall apply to prepaid tuition contracts entered into on or after the effective date for the new price set by the board.

(d) The board shall base the purchase price of a Type I tuition unit on one percent of the cost of the undergraduate resident tuition and required fees for the applicable academic year at the general academic teaching institution with the highest such tuition and fee cost for that academic year.

(e) The board shall base the purchase price of a Type II tuition unit on one percent of the cost of the Weighted Average tuition and required fees of general academic teaching institutions for the applicable academic year. That cost is determined by:

(1) for each general academic teaching institution, multiplying the average amount of the institution's undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours by the number of full-time equivalent undergraduate resident students at that institution;

(2) adding together the products computed under paragraph (1) of this subsection, for each institution; and

(3) dividing the sum determined under paragraph (2) of this subsection, by the total number of full-time equivalent undergraduate resident students at all general academic teaching institutions.

(f) The board shall base the purchase price of a Type III tuition unit on one percent of the cost of the Weighted Average tuition and required fees of two-year institutions of higher education for the applicable academic year, disregarding any portion of the tuition charged by a public junior college to a resident of this state who does not reside within the taxing jurisdiction of the junior college. That cost is determined by:

(1) for each two-year institution of higher education, multiplying the average amount of the institution's undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours by the number of full-time equivalent undergraduate resident students at that institution;

(2) adding together the products computed under paragraph (1) of this subsection, for each institution; and

(3) dividing the sum determined under paragraph (2) of this subsection, by the total number of full-time equivalent undergraduate resident students at all two-year institutions of higher education.

(g) For the purposes of determining the cost of tuition and required fees at an eligible educational institution, if the tuition and required fees vary at an institution by the particular college or program area at the institution or campus, the tuition and required fees for those programs will be considered separately in calculating the weighted average costs for Type II and III tuition units and the price for Type I tuition units.

(h) The board will establish, in compliance with Internal Revenue Code, §529, the minimum amount that the purchaser is required to pay under the contract on behalf of a single beneficiary. The initial minimums set forth in this subsection may be periodically changed by the board as needed to maintain compliance with Internal Revenue Code, §529, or to maintain the actuarial soundness of the fund.

(1) The minimum number of tuition units that must be purchased to establish a new prepaid tuition contract using a lump sum or Pay-As-You-Go purchase is one. Additional tuition units or fractional units may be added to an existing prepaid tuition contract by periodic Pay-As-You-Go purchases of a minimum of $25 each.

(2) The minimum number of tuition units that must be contracted for purchase to establish a new prepaid tuition contract using an installment plan is 25 Type I tuition units or 50 Type II or III tuition units. Additional tuition units or fractional units beyond the initial installment contract amount may be purchased by periodic Pay-As-You-Go purchases of a minimum of $25 each and credited to the same beneficiary in a new or amended contract under the existing enrollment. The purchaser does not have to wait until a new enrollment period to add tuition units through Pay-As-You-Go purchases.

(3) The minimum for an Automated Clearing House (ACH) payment is $25.

(i) The maximum number of tuition units that may be purchased and assigned to a single beneficiary is 600 Type I units or an approximate equivalent in Type II or III units.

(j) At the time of the establishment of the account to which a purchaser's prepaid tuition contract money is assigned, the board may impose an administrative fee not to exceed $25. The administrative fee may be imposed only once for an account established for the same purchaser and beneficiary, regardless of the number of account upgrades, contracts, or payment plans later established by the purchaser for that same beneficiary. Money from that fee will be used directly in maintaining the actuarial soundness of the fund as required by Education Code, §54.770.

§7.125. Redemption of Tuition Units.

(a) In accordance with this subchapter, when a beneficiary under a prepaid tuition contract redeems tuition units to pay costs of tuition and required fees, the board shall apply money in the Fund, in the amount provided by Education Code, §54.765, to pay all or the applicable portion of the costs of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education in which the beneficiary enrolls.

(1) Subject to subsection (c)(2) of this section, and the other provisions of this section, a beneficiary may redeem any type of tuition unit or partial tuition unit for attendance at an institution described by this section.

(2) A general academic teaching institution or two-year institution of higher education shall accept the amount transferred to the institution under Education Code, §54.765(c), when the unit or units are redeemed as payment for all or the applicable portion of the beneficiary's tuition and required fees.

(b) To pay for the entire cost of undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours:

(1) redemption of 100 Type I tuition units (or an approximate equivalent amount of Type II or III units) is required at the general academic teaching institution with the highest tuition and fee cost as described by Education Code, §54.753(d);

(2) redemption of 100 Type II tuition units (or an approximate equivalent amount of Type I or III units) is required at a general academic teaching institution with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(e); and

(3) redemption of 100 Type III units (or an approximate equivalent amount of Type I or II units) is required at a two-year institution of higher education with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(f).

(c) The number of tuition units that must be redeemed to pay for the entire cost of tuition and required fees for an academic year at another general academic teaching institution or two-year institution of higher education may be higher or lower:

(1) in proportion to the amount that the cost of tuition and required fees at that institution is higher or lower than the amount determined for the institution with the highest cost or Weighted Average cost, as applicable; or

(2) if a more or less valuable type of tuition unit is redeemed.

(d) To assist purchasers in determining the number of tuition units a beneficiary must redeem to cover the costs of tuition and required fees at general academic teaching institutions and two-year institutions of higher education, each year the board shall prepare a tuition unit redemption chart and will post the chart on the board's Internet website. The chart will show for each general academic teaching institution and for each two-year institution of higher education the number of each type of units purchased that year that would be required to cover the cost of tuition and required fees, based on an academic year consisting of 30 semester credit hours.

(1) The exact amount of tuition units that will be required to attend a particular institution will depend upon the cost of tuition and required fees at the institution in the year of redemption.

(2) For Type I tuition units, the number of units required to attend a particular institution may be less than anticipated when purchased if that institution's costs are less than the general academic teaching institution with the highest tuition and fee cost in the year of redemption.

(3) For Type II and III tuition units, the number of units required to attend a particular institution may be more or less than anticipated when purchased, and will depend on whether that institution's costs are higher or lower than the Weighted Average cost in the year of redemption. To the extent the cost of a particular institution is higher than the Weighted Average cost, the beneficiary will have to redeem additional tuition units to cover the higher cost, or pay the amount of the difference as provided in subsection (e) of this section.

(e) If a beneficiary redeems fewer tuition units of the type or combination of types necessary to pay the total cost of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education at which the beneficiary enrolls, the beneficiary is responsible for paying the amount of the difference between the amount of

tuition and required fees for which the beneficiary pays through the redemption of one or more tuition units and the total cost of the beneficiary's tuition and required fees at the institution.

(f) A beneficiary who redeems Type III tuition units (or an approximate equivalent amount of Type I or II units) to attend a public junior college and who does not reside within the taxing jurisdiction of the junior college is responsible for paying any portion of the tuition charged by the junior college to persons who do not reside within that taxing jurisdiction.

(g) A beneficiary or purchaser may not redeem a tuition unit earlier than the third anniversary of the date the unit was purchased.

(1) For the purpose of calculating the three-year holding period for an initial Pay-As-You-Go purchase, the first payment due date after initially enrolling in the program is considered the date the initial units were purchased. These units may not be redeemed to pay for tuition and required fees until the third anniversary after the payment due date.

(2) For installment plan payments, the three-year holding period is considered met if the purchaser enrolls in the program and the first payment due date is at least three years prior to any redemption of tuition units, and the installment plan is paid in full before redemption of any of the tuition units.

(3) Additional Pay-As-You-Go purchases start a new three-year holding period as of the date payment is received for the additional tuition units.

(4) Under the three-year holding period, the latest date that a purchaser could purchase tuition units to pay for a semester of undergraduate education using Pay-As-You-Go purchases is three years prior to the date of expected redemption of the tuition units, subject to the requirement that all tuition units under the contract must be used not later than the 10th anniversary of the date the beneficiary is projected to graduate from high school, not counting time spent by the beneficiary as an active duty member of the United States armed services.

(5) If all of the tuition units in an account do not meet the three-year holding period, the purchaser may redeem those units or fractional units that meet the three-year holding period, and redeem the remaining tuition units in the account when the three-year holding period is met.

(h) A beneficiary may redeem more than 100 tuition units in one academic year of the type or combination of types as needed to pay the total cost of the beneficiary's tuition and required fees at an eligible educational institution.

(i) To accommodate part-time attendance or the enrollment in more or less semester hours than the contemplated 30 credit hours in an academic year, the board may calculate a per credit hour tuition unit cost for the eligible educational institution applicable to the year of redemption, whereby the number of tuition units required to be redeemed shall be in proportion to the amount that tuition and required fees to be charged to the beneficiary by the eligible educational institution are more or less costly than the cost for attending two semesters of 15 credit hours each or 30 total credit hours in an academic year.

(j) A beneficiary may redeem fractional tuition units as needed to pay the cost of the beneficiary's tuition and required fees at an eligible educational institution.

§7.126. Prepaid Tuition Contract.

(a) To apply for enrollment in the program, a purchaser shall complete and submit a prepaid tuition contract form, approved by the board.

(b) A purchaser shall provide the following information on the form:

(1) the name, address, social security number or tax identification number of the purchaser;

(2) name, date of birth and social security number of the beneficiary, or in the case of a newborn, provide proof of an application for a social security number through the Social Security Administration;

(3) the date the beneficiary is projected to graduate from high school;

(4) a certification indicating that the purchaser is eligible to enroll in the program because either the beneficiary or a parent of the beneficiary is a resident of this state, as provided in §7.127 of this title (relating to Purchaser; Beneficiary);

(5) how the purchaser intends to finance the prepaid tuition contract;

(6) the name of any person who shall have a right of survivorship with respect to the purchaser's rights under the prepaid tuition contract;

(7) the annual gross household income of the purchaser;

(8) the highest educational level achieved by the purchaser;

(9) the race or ethnicity of the beneficiary; and

(10) how the purchaser first learned about the program.

(c) The prepaid tuition contract shall specify:

(1) the name, address, social security number or tax identification number of the purchaser;

(2) the terms under which the purchaser must pay any amounts owed under the contract;

(3) the consequences of default;

(4) the name, date of birth, and social security number of the beneficiary under the contract, provided that the board may allow additional time for the purchaser to obtain the social security number of a newborn;

(5) the terms under which another person may be substituted as the beneficiary;

(6) the date the beneficiary is projected to graduate from high school;

(7) the name of any person designated by the purchaser who shall have a right of survivorship with respect to purchaser's rights under the prepaid tuition contract;

(8) the name of any person who may terminate or cancel the contract;

(9) the terms under which the contract may be terminated or cancelled;

(10) the terms under which the purchaser is entitled to a refund;

(11) the method by which the amount of the refund is computed; and

(12) other provisions the board considers necessary or appropriate.

(d) The prepaid tuition contract may provide for the purchase of additional tuition units in subsequent years at the then-current price of the additional units.

(e) The prepaid tuition contract may also provide for the purchase of additional units in subsequent years through the Texas Save and Match program or through gift or other contributions by persons on behalf of a beneficiary, at the then-current price of the additional units at the time a contribution is made.

§7.127. Purchaser; Beneficiary.

(a) A purchaser may be any person who is permitted to be a purchaser under Internal Revenue Code, §529. The purchaser is not required to be a resident of this state, except as provided by subsection (d)(2) of this section.

(b) A purchaser is the owner of the account to which the purchaser's prepaid tuition contract money is assigned.

(c) A prepaid tuition contract may be established by one purchaser at the time it is established during enrollment, and thereafter it shall have only one purchaser as owner except when owned by more than one individual, trust, estate, or UGMA/UTMA custodian, guardian, corporation, non-profit entity, or other legal entity (or any combination thereof) as a result of a transfer by operation of law.

(d) At the time the purchaser enters into a prepaid tuition contract, the beneficiary of the contract must be:

(1) a resident of this state; or

(2) a nonresident who is the child of a parent who is a resident of this state.

(e) Notwithstanding any provision of Education Code, Chapter 54, Subchapter B, tuition and required fees charged by a general academic teaching institution or two-year institution of higher education that are paid for with tuition units, shall be determined as if the beneficiary of that contract were a resident student.

§7.128. Contract Payment.

(a) Payments under prepaid tuition contracts may be made in single or periodic Pay-As-You-Go payments, or under an installment plan, or both. The first payment due date for a newly enrolled purchaser is May 1, or as may be otherwise established by the board for subsequent enrollment periods.

(b) For payments under a contract to be made in installments over a period longer than one year, those payments can be made in annual, or monthly installments, in accordance with any permitted installment plans established by the board.

(1) Monthly installment plans shall include as a minimum: monthly installments to matriculation, a 10-year installment plan, and a 5-year installment plan.

(2) Annual installment plans include annual installments to matriculation, a 5-year installment plan, or a 10-year installment plan.

(3) Installment payments shall be due on the 1st of the month.

(4) Installment payments shall include an implied interest component at a rate set by the board to ensure the actuarial soundness of the fund.

(5) Installment plans must be paid in full prior to redemption of any units purchased by the installment plan.

(6) Under an installment plan, the basic unit price will not change over the life of the installment agreement, unless the agreement is later amended. The tuition unit price for new installment plans to be entered into during later enrollment periods will be adjusted by the board to reflect the then effective base tuition unit price and an updated implied interest component at a rate applicable to the new installment plans.

(7) A purchaser may initially establish both an installment plan contract and a Pay-As-You-Go contract when enrolling in the program, but the contract payments will be tracked separately. The purchaser will receive one combined account statement reflecting all payments under the different payment plans for the same purchaser and same beneficiary.

(c) There shall be no prepayment penalty imposed if a purchaser pays off an installment plan ahead of the schedule outlined in the prepaid tuition contract. Prepayments may result in a credit toward any monies due to reflect that the prepaid tuition contract was paid off early. Prepayments may be applied to reduce the outstanding contract balance, reduce the amount or number of monthly payments, or to make monthly payments ahead of schedule, at the option of the purchaser. In the absence of direction from the purchaser, prepayments will be applied to reduce the outstanding contract balance.

(d) The price for tuition units purchased using Pay-As-You-Go payments shall be the tuition unit price established by the board in accordance with §7.124 of this title (relating to Prepaid Tuition Units: Purchase; Assigned Value; Types; Price), for the sales period in which the tuition unit was purchased. If additional Pay-As-You-Go payments are made to purchase additional tuition units under a pre-existing prepaid tuition contract, the prepaid tuition contract shall be automatically amended to incorporate the additional tuition units purchased and the additional tuition units shall be credited to the existing account.

(e) A purchaser may make payments under a prepaid tuition contract by check, money order, electronic funds transfer, or payroll deduction. A purchaser may change payment methods. Credit cards may not be used to purchase tuition units.

(f) A purchaser may make payments under a prepaid tuition contract by payroll deduction, under procedures developed by the board and the comptroller to facilitate payments.

(1) To facilitate the establishment of payroll deductions by public employees, the board may extend the enrollment period as necessary to accommodate the employee benefit open enrollment period of the state or a political subdivision of the state during which payroll deductions are normally established.

(2) A purchaser electing to make payments under a prepaid tuition contract by payroll deduction shall specify whether the payments should be applied to pay for purchases under an installment plan or to make regular Pay-As-You-Go purchases.

(3) The purchase price for tuition units to be purchased by payroll deduction shall be based on:

(A) for payments under an installment plan, the price in effect for the sales period when the first tuition unit payment is or was received, regardless of the date the employee enrolls in payroll deduction; or

(B) for Pay-As-You-Go purchases, the price in effect for the sales period when each payment is actually received.

(g) Upgrades. Upgrades to an existing prepaid tuition unit account are allowed. An upgrade of an account is defined as adding additional tuition units to the account beyond the units specified in the original or existing prepaid tuition contract, by amending the contract or adding a new contract to the account.

(1) Pay-As-You-Go purchases of additional tuition units can be added to an existing Pay-As-You-Go contract without amending the contract. A new three-year holding period for tuition unit redemptions begins for new Pay-As-You-Go purchases.

(2) Pay-As-You-Go purchases of additional tuition units can be added to an existing enrollment that has a pre-existing installment plan contract, at any time during the sales period. However, Pay-As-You-Go purchases will be under a new contract and tracked separately from the installment plan purchases for implementation of the three-year holding period. The purchaser will receive a single account statement reflecting all payment plans under the account.

(3) The payment timeframe of an existing installment plan contract may be extended by contract amendment so long as the amended contract calls for payment in full prior to redemption of any of the tuition units. Other upgrades to an existing installment plan will also be performed by contract amendment.

(4) An installment plan contract may be added to an existing account that is set up as a Pay-As-You-Go plan contract, but only during an enrollment period. The new installment plan will be considered a separate contract from the Pay-As-You-Go contract. The installment plan for additional units will be priced at the tuition unit prices in effect on the date when the plan manager receives and accepts a signed new contract from the purchaser to acquire the additional tuition units. Both payment plans will be reflected on a single account statement for the purchaser.

(5) A purchaser can have multiple payment plans in a single beneficiary account but the aggregate amount should not exceed the limit of 600 Type I tuition unit equivalents per beneficiary.

(h) Downgrades. A prepaid tuition unit contract may be downgraded without terminating the contract. A downgrade of an account is defined as agreeing to purchase fewer tuition units than originally specified in the original contract.

(i) The board may impose a fee for a late payment under a prepaid tuition contract.

(j) The purchaser will also bear the cost if a purchaser's attempted payment is refused by a financial institution.

§7.129. Deferred Use of Prepaid Credit Hours.

(a) A prepaid tuition contract will allow a beneficiary:

(1) to elect to pay from a source other than tuition units purchased under the contract the beneficiary's tuition and required fees for some or all of the tuition and required fees to which the beneficiary is entitled to payment under the contract; and

(2) to defer to a subsequent semester or other academic term the right to payment of the beneficiary's tuition and required fees by using tuition units remaining under the contract.

(b) This section does not affect the date on which a prepaid tuition contract terminates and does not give the beneficiary the right to a payment under the contract after termination of the contract.

§7.130. Change of Beneficiary.

(a) The purchaser of a prepaid tuition contract may designate a different beneficiary in place of the original beneficiary subject to the following conditions:

(1) the new beneficiary must meet the requirements of a beneficiary under §7.127 of this title (relating to Purchaser; Beneficiary), on the date the designation is changed;

(2) the new beneficiary must meet the requirements of Internal Revenue Code, §529 (such as being a member of the family of the former beneficiary, as defined by §529(e)(2)), to prevent the change of beneficiary from being treated as a distribution under that law;

(3) documentation must be submitted evidencing the relationship between the replacement beneficiary and the former beneficiary; and

(4) the terms of the contract may be adjusted so that the purchaser is required to pay the amount the purchaser would have been required to pay had the purchaser originally designated the new beneficiary as the beneficiary, taking into account any payments made before the date the designation is changed.

(b) Amounts paid before the beneficiary is changed shall be credited against amounts due at the time of the change. If the amount due at the time of the change is less than the amount paid prior to the change, such amount shall be credited against other amounts due through the term of the contract. If the amount paid prior to the change exceeds the amounts due through the term of the contract, the amount in excess of the amounts due shall be refunded to the purchaser.

(c) A purchaser must submit a properly signed request form approved by the board to change a beneficiary.

(d) A fee will not be imposed in connection with the designation of a new beneficiary under this subchapter.

(e) The purchaser of a prepaid tuition contract may not sell the contract.

§7.131. Purchaser Obligations and Requests.

(a) The purchaser is the person who is obligated to make payments under a prepaid tuition contract.

(b) Unless otherwise provided in this subchapter, the purchaser shall execute all prepaid tuition contract changes, conversions, transfers, terminations and refund requests.

(c) Any request to change a purchaser, change a beneficiary, or terminate a contract, must be submitted in a writing signed by the purchaser.

(d) A purchaser may designate in writing to the board on the enrollment form, or in a separate written request, a person with a right of survivorship in the event of the purchaser's death. However, until the rights under the contract pass to the designee, such designee has no right to direct decisions regarding contract changes, conversions, transfers or termination. Without limitation on the foregoing, the contract may be modified or terminated by, or refund disbursed to, the purchaser without the consent or authorization of a designee of survivorship rights. It is the purchaser's responsibility to update the survivorship information as appropriate.

§7.132. No Promise or Guarantee of Admission.

Nothing in this subchapter or the program should be construed as a promise or guarantee that a beneficiary will be:

(1) admitted to any public or private institution of higher education;

(2) admitted to a particular public or private institution of higher education;

(3) allowed to continue enrollment at a public or private institution of higher education; or

(4) graduated from a public or private institution of higher education.

§7.133. Contract Termination.

(a) The prepaid tuition contract may be terminated by the board:

(1) if the board determines that a purchaser has misrepresented residency, age, or other information required by the board in connection with the purchase of a contract;

(2) upon default for failure to pay any amounts due under the prepaid tuition contract prior to the expiration of any applicable grace periods as outlined in §7.134 of this title (relating to Default and Delinquency Conversion), unless such contract is converted to a Pay-As-You-Go contract; or

(3) if the purchaser fails to provide a valid social security account number or other applicable tax identification number for the purchaser or beneficiary within six months of enrollment.

(b) At its option, a purchaser may voluntarily cancel a prepaid tuition contract upon submission of a proper written request signed by the purchaser.

(c) A prepaid tuition contract terminates automatically on the tenth anniversary of the date the beneficiary was projected to graduate from high school, as indicated by the purchaser in the enrollment contract.

(1) For the purpose of this subsection, the date the beneficiary is projected to graduate from high school includes the projected completion of a nontraditional secondary education, such as obtaining a general education development certificate, certificate of high school equivalency, or other credentials equivalent to a public high school degree, as indicated by the purchaser in the enrollment contract.

(2) Time spent as an active duty member of the United States armed services shall toll the ten-year anniversary period.

(3) If there is a change of beneficiary, the ten-year anniversary period is calculated based on the projected high school graduation date of the new beneficiary, as indicated in the enrollment contract or change of beneficiary form.

(4) If a contract has been terminated automatically, the plan manager will make a reasonable effort to locate the purchaser for the purpose of processing a refund.

(5) Until the purchaser is located or the purchaser applies for a refund, any unused monies from the account will remain in the Fund to support the actuarial soundness of the Fund.

(6) Once a contract has been terminated automatically, the account will cease to accrue any further net earnings as of the date the contract has been terminated.

(d) Refunds for cancellations or terminations will be governed by §7.135 of this title (relating to Refunds).

§7.134. Default and Delinquency Conversion.

(a) An account is subject to a late payment penalty for payments not received within 15 days of the payment due date.

(b) If no payments are received within 90 days of the first payment due date under a newly established account, the account is in default and will be cancelled.

(c) Failure to make any payment within 30, 60, or 90 days of the due date will result in the plan manager sending out a delinquency notice. A late payment penalty will be assessed in each instance, and the failure to make timely payment will be considered a default.

(d) If a default has not been cured within 90 days of the outstanding payment default date, the plan manager will send out a default notice advising the purchaser that the contract will be converted in 30 days if not properly cured by the purchaser.

(e) A purchaser may cure the default status of its prepaid tuition contract prior to the expiration of 120 days after the payment default date, subject to payment of all the delinquent amounts and any fees specified in the board's fee schedule. A contract that is not cured within 120 days after default shall be converted from an installment plan to a "Pay-As-You-Go" contract reflecting the number of tuition units paid for at the time of the conversion, less any outstanding fees. Any future purchases under the contract will reflect the prices in existence at the time of purchase. If the purchaser wishes to establish another installment plan at a later date after a contract has been converted, the purchaser must wait until the next enrollment period to do so.

(f) Failure to make timely payments for 6 consecutive or nonconsecutive months out of a 12 month period may also result in termination of the installment plan and conversion of the contract to a Pay-As-You-Go contract.

(g) Any refund in the event of a default shall be limited to the Reduced Refund Value as governed by the provisions related to contract termination in §7.135 of this title (relating to Refunds).

§7.135. Refunds.

(a) Refunds shall be made in accordance with provisions of this subchapter and the prepaid tuition contract, in a manner that will not adversely affect the tax status of the program under applicable provisions of Internal Revenue Code, §529. Refunds shall be governed by this subchapter as amended and Internal Revenue Code, §529, as in effect on the date the request for refund is submitted to the plan manager.

(b) Earnings may be paid with a refund only if the board determines that such payment will not adversely affect the actuarial soundness of the fund to pay the costs of program administration and operations and to meet the obligations of the program, as provided by Education Code, §54.770. It is the board's intent that refund amounts will be based on the definitions of "Refund Value," "Reduced Refund Value," or "Transfer Value," in §7.122 of this title (relating to Definitions), as applicable.

(c) The purchaser is entitled to a refund following cancellation or termination of a prepaid tuition contract, subject to any limitations imposed by Internal Revenue Code, §529, this subchapter, and the provisions of the prepaid tuition contract.

(d) Refunds shall be made to the purchaser of the prepaid tuition contract or, in the event of the purchaser's death, the person designated in the enrollment contract or other legal document to have the right of survivorship.

(e) Should a beneficiary terminate his/her student status on or after the date on which the institution denies refunds to students withdrawing for a particular semester, no refund shall be paid under the prepaid tuition contract for amounts relating to such semester.

(f) If the prepaid tuition contract is cancelled due to the death or disability of the beneficiary, or due to the receipt of a scholarship by the beneficiary, the purchaser may elect to change the beneficiary or apply for a refund of the Refund Value of the account, less any fees due and payable to the program under the board's fee schedule. The administrative fee will be retained by the program.

(g) If the beneficiary redeems fewer tuition units to pay the cost of tuition and required fees than the number of units purchased on behalf of the beneficiary under a prepaid tuition contract, other than to defer redemption as permitted in accordance with Education Code, §54.758, the purchaser may request a refund of the Refund Value of the account, less any fees due and payable under the contract, or transfer the remaining units to another beneficiary in accordance with this subchapter. The administrative fee will be retained by the board.

(h) If the beneficiary decides not to attend an institution of higher education within a reasonable amount of time after graduating from high school, the purchaser may elect to:

(1) change the beneficiary to another eligible beneficiary;

(2) hold the tuition units in the account until the 10th anniversary of the date the beneficiary was projected to graduate from high school, not counting time spent by the beneficiary as an active duty member of the United States armed services; or

(3) cancel the contract and request a refund of the Refund Value of the account, less any fees due and payable to the program. The administrative fee will be retained by the board.

(i) If the prepaid tuition contract is terminated due to misrepresentation, failure to provide required information or default, the purchaser may apply for a refund of the Reduced Refund Value of the account, less any fees due and payable to the program under the board's fee schedule. The administrative fee will be retained by the program.

(j) If the prepaid tuition contract is terminated automatically due to expiration of the 10 year anniversary period specified in §7.133(c) of this title (related to Contract Termination), the purchaser may apply for a refund of the Refund Value of the account, less any fees due and payable to the program under the board's fee schedule. However, the Refund Value will be limited to include only net earnings that have accrued under the contract up until the date the contract has been terminated automatically.

(k) In the event of any other cancellation request not addressed separately in this subchapter:

(1) if the cancellation request is received prior to the third anniversary of the first payment due date, the purchaser may apply for a refund of the Reduced Refund Value of the account. The administrative fee will be retained by the board; or

(2) if the cancellation request is received on or following the third anniversary of the first payment due date, the purchaser may apply for a refund of the Refund Value of the account (for those tuition units held for three or more years) or the Reduced Refund Value (for tuition units held less than three years). The administrative fee will be retained by the board.

(l) A lump sum refund may be made within 60 days of receiving a properly completed signed request for refund from the purchaser on a form promulgated by the plan manager, along with any required supporting documentation. Proof of death, disability or scholarship shall be in a form acceptable to the board.

(m) Notwithstanding any other provision of this section, the purchaser may designate in the prepaid tuition contract a person who shall have a right of survivorship with respect to purchaser's rights under a prepaid tuition contract; provided that such designation shall in no way affect the purchaser's ability to modify or terminate the contract and receive a refund without the consent or authorization of the designee. The purchaser may change the designation at any time by properly completing and submitting to the plan manager a right of survivorship form. The purchaser shall provide any other information requested by the board in support of the designation. It is the purchaser's responsibility to provide the plan manager with current information for survivorship rights.

(n) Distributions or transfers to another qualified tuition plan are governed by §7.137 of this title (relating to Transfers Among 529 Plans) and Education Code, §54.7671.

(o) Refunds or distributions that exceed the qualified higher education expenses incurred by the beneficiary during the year of the distribution, or other nonqualified withdrawals, may subject the distributee to income tax liability on any earnings and a tax penalty, as provided by Internal Revenue Code, §529.

(p) The number of refunds per year for a single purchaser shall be limited to twice in a 12 month period and shall be for a minimum of 100% of the purchaser's tuition units or in increments of 25 units, whichever is less.

§7.136. Transfers to Institutions on Redemptions of Tuition Units.

(a) When a beneficiary enrolls at a general academic teaching institution or two-year institution of higher education and notifies the institution that payment will be made by redeemed tuition units, the comptroller will arrange for the transfer to the institution of the appropriate amount specified under Education Code, §54.765(c), (d) and (e).

(b) When a beneficiary enrolls at a private or independent institution of higher education or accredited out-of-state institution of higher education, upon request the comptroller will arrange for the transfer to the institution of the amount specified under Education Code, §54.765(f).

§7.137. Transfers Among 529 Plans.

(a) A purchaser may transfer money between an account under this subchapter and an account under another plan established by this state or by another state or other authorized entity in accordance with Internal Revenue Code, §529, to the extent and in the manner authorized by that section.

(b) The value of the account at the time of transfer is the Transfer Value less any fees due and payable under the contract.

(c) To apply for a transfer, the purchaser shall complete and submit a transfer request form promulgated by the board not later than 30 days prior to the desired effective date of the transfer. Upon request by the executive director, plan manager, or other designee, the purchaser shall provide any additional information necessary to properly effectuate the transfer.

(d) Any fees that are due and payable to the program under the board's fee schedule must be paid by the purchaser prior to the transfer.

(e) Transfers to another qualified tuition program for the benefit of a designated beneficiary are limited to one per 12-month period or as otherwise provided by Internal Revenue Code, §529.

§7.138. Recordkeeping for Certain Rollover Contributions.

(a) In the case of a rollover contribution from another qualified tuition plan, a Coverdell education savings account, or a qualified U.S. Savings Bond, the purchaser shall provide appropriate documentation and certifications to the plan manager to identify the source of the contribution, confirm that the contribution is a qualified rollover under Internal Revenue Code, §529, and to specify that portion of the contribution that is attributable to the purchaser's contributions or investment in the previous account and that portion of the rollover contribution that is attributable to earnings that were accumulated in the previous account. Rollovers must be completed within 60 days to avoid potential tax consequences.

(b) For a purchase of tuition units using a contribution from a direct transfer between 529 programs, such as a trustee-to-trustee rollover, the purchaser must arrange for the distributing program to provide to the plan manager a statement setting forth the earnings portion of the rollover distribution within 30 days after the distribution or by January 10th of the year following the calendar year in which the rollover occurred, whichever is earlier.

(c) Upon receipt of the rollover contribution, the plan manager will add the earnings portion of the rollover contribution to the earnings recorded under the prepaid tuition contract to which the rollover contribution is made.

(d) Until the plan manager receives appropriate documentation showing the earnings portion of the rollover contribution, the board will treat the entire amount of the contribution as earnings in the prepaid tuition contract receiving the distribution.

(e) For the purpose of this section, "appropriate documentation" means:

(1) in the case of a rollover contribution from a Coverdell education savings account, an account statement issued by the financial institution that acted as trustee or custodian of the education savings account that shows basis and earnings in the account;

(2) in the case of a rollover contribution from the redemption of qualified U.S. Savings Bonds, an account statement or Form 1099-INT issued by the financial institution that redeemed the bonds showing interest from the redemption of the bonds;

(3) in the case of a rollover contribution from another 529 program, a statement issued by the distributing 529 program that shows the earnings portion of the distribution; or

(4) other documentation acceptable to the board supported by the purchaser's certification.

§7.139. Actuarial Soundness of Fund.

(a) The board will administer the fund in a manner that is sufficiently actuarially sound to pay the costs of program administration and operations and to meet the obligations of the program.

(b) The board will annually evaluate the actuarial soundness of the fund.

(c) The board may adjust the terms of subsequent prepaid tuition contracts as necessary to ensure the actuarial soundness of the fund.

§7.140. Suspension of New Enrollment; Program Modification or Termination.

(a) On the request of the comptroller as the comptroller considers necessary to ensure the actuarial soundness of the fund, the board may temporarily suspend new enrollment in the program.

(b) If the comptroller determines that the program is financially infeasible, the comptroller shall notify the governor and the legislature and recommend that the program be modified or terminated.

§7.141. Effect of Program Termination on Contract.

(a) A prepaid tuition contract remains in effect after the program is terminated if, when the program is terminated, the beneficiary:

(1) has been accepted by or is enrolled at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education; or

(2) is projected to graduate from high school not later than the third anniversary of the date the program is terminated.

(b) A prepaid tuition contract terminates when the program is terminated if the contract does not remain in effect under subsection (a) of this section.

(c) For contracts that are terminated pursuant to subsection (b) of this section, the purchaser is entitled to a refund of the Refund Value, less any fees that are past due and payable to the program under the board's fee schedule.

§7.142. Statement Regarding Status of Prepaid Tuition Contract.

(a) Not later than January 1 of each year, the plan manager shall make available online without charge to each purchaser a statement of:

(1) the amount paid by the purchaser under the prepaid tuition contract;

(2) the total number of each type of tuition unit covered by the contract at any one time;

(3) the number of each type of tuition unit remaining under the contract;

(4) the number of each type of tuition unit that has met the three-year holding period;

(5) the value of the purchasers' tuition units if redeemed at any general academic teaching institution or two-year institution of higher education designated for that year by the purchaser in the time and manner required by the board, not to exceed five institutions, with such information being provided in the tuition unit redemption chart developed pursuant to §7.125(d) of this title (relating to Redemption of Tuition Units); and

(6) any other information the board determines is necessary or appropriate.

(b) As soon as feasible after the end of the calendar year, the plan manager shall provide a written statement without charge to each purchaser reflecting the information listed in subsection (a) of this section, covering activities in the account through the end of the calendar year.

(c) The plan manager shall provide a separate accounting for each designated beneficiary.

(d) The plan manager shall also provide a statement if tuition units are redeemed under the contract during the year, and if any other distributions are made under the contract that calendar year.

§7.143. Texas Save and Match Program.

(a) The board establishes the Texas Save and Match program under which money paid by a purchaser under a prepaid tuition contract may be matched with:

(1) contributions made by another person or entity to the Texas Save and Match program and used to purchase additional tuition units on behalf of the beneficiary; and

(2) money appropriated by the legislature for the Texas Save and Match program and used to purchase additional tuition units on behalf of certain beneficiaries.

(b) Beneficiaries eligible to receive matching contributions from money appropriated by the legislature for the Texas Save and Match program include:

(1) beneficiaries whose annual household income is below the state median family income, adjusted for household size;

(2) beneficiaries whose enrollment in the program would promote the participation goals and targets of the most recent revision of "Closing the Gaps," the state's master plan for higher education; or

(3) beneficiaries who meet other criteria that may be established by board rule.

(c) If a beneficiary does not qualify for a matching contribution from money appropriated by the legislature, the beneficiary may still receive a matching contribution that has been made and designated by another person or entity for that beneficiary.

(d) The board, or the executive director on behalf of the board, may solicit and accept gifts, grants, loans, and other aid from any source to benefit the Texas Save and Match program, the prepaid tuition program, other beneficiaries under the prepaid tuition program, or as otherwise indicated by the donor. Donations received by the board or executive director may be used to purchase tuition units, award scholarships, facilitate marketing or other implementation of the prepaid tuition program, or to fulfill other donor intent.

(e) Application Process and Forms.

(1) A person desiring to make a matching contribution to a prepaid tuition contract shall complete and submit a matching contribution form promulgated by the executive director, along with any requested supporting documentation, in accordance with the instructions on the form.

(2) If money is appropriated by the legislature for the Texas Save and Match program, the board will establish an application process for purchasers to apply for matching contributions from the money appropriated for that purpose.

(f) Beneficiaries may be selected for a matching contribution by:

(1) the person or entity making the contribution; or

(2) the executive director, upon application of the purchaser demonstrating that the beneficiary meets the eligibility criteria established by the board under subsection (b) of this section, or by the executive director under subsection (d) of this section, to the extent of available funds for that purpose.

(g) The total amount paid and contributed to a prepaid tuition contract on behalf of a single beneficiary may not exceed the value equivalent of 600 Type I tuition units or any other limit that may be established by board policy and Internal Revenue Code, §529. The plan manager shall disallow any matching contributions on behalf of a designated beneficiary if the additional contribution would result in exceeding any limits established under this subsection.

(h) A person or entity making a matching contribution and any designated beneficiary may not directly or indirectly direct the investment of any contributions to, or earnings on, the account.

(i) Matching contribution payments may be made by check, money order, or electronic funds transfer.

(j) The plan manager shall keep records of contributions made under the Texas Save and Match program.

(k) Timing of matching contributions.

(1) Matching contributions may be made at any time after a purchaser has established an account within an enrollment period, to match any payments made by the purchaser during the sales period.

(2) Matching contributions may be used to help meet the minimum tuition unit purchases required to establish an account.

(l) The executive director shall develop operating procedures for the Texas Save and Match program.

§7.144. Gift Contributions.

(a) A person or entity may purchase tuition units for a beneficiary designated in an existing prepaid tuition contract by paying an amount referred to as a "gift contribution."

(b) A gift contribution may purchase additional tuition units or, in the case of a prepaid tuition contract using the installment plan for purchases, the gift contribution may be applied to current or future installment payments covered by the prepaid tuition contract.

(c) If the prepaid tuition contract uses an installment plan for purchases, the gift contribution will be applied to the next payment(s) due under the installment plan, unless the plan manager receives other written instructions from the purchaser of the existing prepaid tuition contract. Gift contributions may be used to reduce principal under an installment plan, reduce the amount or number of monthly payments, or to purchase additional lump sum tuition units, at the option of the purchaser.

(d) If a gift contribution results in an account balance that exceeds the value equivalent of 600 Type I tuition units or any other limit that might be imposed under Internal Revenue Code, §529, the excess contribution amount will be returned to the contributor.

(e) Persons or entities may make gift contributions to an established prepaid tuition account at any time, including outside the enrollment period.

(f) The tuition unit price for any lump sum gift contributions will be the tuition unit price in effect for the sales period when the payment is actually received by the plan manager. If the gift contribution is applied to make installment plan purchases that are due under the contract, the gift contribution will be applied at the price established in the prepaid tuition contract for the installment payments.

(g) Tuition units purchased by gift contribution and any installment payments made by gift contribution that are credited to an existing prepaid tuition contract account will be owned by, and subject to the direction and control of, the purchaser of the existing prepaid tuition contract. Such tuition units will not be owned by, or under the direction or control of, the person or entity making the gift contribution.

(h) A person or entity making a gift contribution and any designated beneficiary may not directly or indirectly direct the investment of any contributions to, or earnings on, the account.

§7.145. Marketing Considerations.

(a) The program will be marketed in a manner that promotes the participation goals and targets of the most recent revision of "Closing the Gaps," the state's master plan for higher education.

(b) The program will seek strategies that promote enrollment in the program by persons likely to qualify for federal earned income tax credits.

(c) The executive director may establish workgroups as necessary to identify enrollment barriers, solicit input from key stakeholders, and recommend initiatives to enhance program participation, especially for purchasers and beneficiaries eligible for the Texas Save and Match program. The workgroups may include, without limitation, representatives from such agencies as the Health and Human Services Commission, Texas Workforce Commission, the Texas Higher Education Coordinating Board, other agencies, community organizations, and constituencies interested in promoting higher education.

(d) The executive director may use employees of the executive director to conduct or assist in conducting marketing efforts on behalf of the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 19, 2008.

TRD-200803165

Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER P. DISHONORED PAYMENT DEVICE FEE

37 TAC §1.211

The Texas Department of Public Safety proposes an amendment to §1.211, concerning Dishonored Check Fee. Amendment to the section changes the subchapter and section title in order to address other types of payments, such as electronic. In addition, the section is reformatted in order to add new subsection (a) which addresses electronic payments, and new subsection (c) which addresses how reimbursement payments are to be applied.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for local government or local economies. The projected annual increase in revenue to the state for collecting the increased dishonored fee is $26,300.00. The projected annual increase in revenue to the state for collecting non-payments associated with electronic transactions is $25,500.00.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. The anticipated economic cost to individuals who are required to comply with the rule as proposed will be the $30 dishonored payment device fee. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be an increase in the amount of money the department collects to cover the rising costs resulting from dishonored payment devices. The person who provides the dishonored payment device should pay the resulting costs, rather than the taxpayers.

The Department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Celia Fuller, Manager, Central Cash Receiving, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0131, (512) 424-2240.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.0135.

Texas Government Code, §411.004(3) and §411.0135 are affected by this proposal.

§1.211. Dishonored Payment Device[~~Check~~] Fee.

(a) When used in this rule, the term "dishonored payment device" is defined as a check, draft, order, electronic funds transfer or other instrument that is not honored upon presentment for reasons including, but not limited to, the account upon which the device has been drawn or made does not exist, is closed or does not have sufficient funds or credit for payment of the device in full.

(b) A[~~Pursuant to Texas Business and Commerce Code, §3.506, a~~] fee of $30[~~$25~~] will be assessed on each dishonored payment device[~~check~~] returned to the Texas Department of Public Safety.

(c) Any payment made will first be applied to the dishonored payment device fee and the remainder will be applied to the underlying charge or fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803250
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 424-2135

♦ ♦ ♦

CHAPTER 15. DRIVER LICENSE RULES

SUBCHAPTER A. LICENSING REQUIREMENTS

37 TAC §15.1

The Texas Department of Public Safety (Department) proposes an amendment to §15.1, concerning Who Must Be Licensed.

On April 24, 2008, the Public Safety Commission adopted changes to 37 TAC §15.24 and §15.25. These changes were effective May 20, 2008. As a result of these changes, the Department proposes amending §15.1 to conform to the recent rule changes. In addition, the Department proposes adding the term "personal identification certificate" to paragraph (2) so that the definition of resident is uniformly applied to applicants for a driver license and applicants for a personal identification certificate.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. The cost to individuals who are required to comply with the rule as proposed will be the standard cost of obtaining a Texas driver license or identification certificate. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Written comments on the proposal may be submitted to Susana Esparza, Staff Attorney, Driver License Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0300; by fax to (512) 424-5233; or by email to Susana.Esparza@txdps.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

A public hearing is scheduled for Tuesday, July 15, 2008, from 9:00 a.m. to 12:00 p.m. at the Texas Department of Public Safety Headquarters, CLE Auditorium, located at 6100 Guadalupe Street, Building E, Austin, Texas 78752. Persons requiring further information, special assistance, or accommodations should contact Natalie Acevedo at (512) 424-5232.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 and §521.142 are affected by this proposal.

§15.1. Who Must Be Licensed.

All persons, except those expressly exempt by law, who live in Texas and operate a motor vehicle upon a public street or highway must have a valid driver license.

(1) Any person holding a valid driver license need not obtain any other state permit for the operation of a motor vehicle on the highway. Some cities, however, issue special city taxi driver permits by ordinance or state law.

(2) For driver licensing and personal identification certificate policy purposes, a resident is defined as a [~~every~~] person who actually and physically lives [~~whose domicile is~~] in the State of Texas.

(3) All other persons who do not come within the scope of the preceding definition of a resident will be classified as nonresidents.

[~~(4) When needed, a Texas driver license (noncommercial driver license) may be issued to any nonresident who is able to meet the requirements.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803248
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 424-2135

♦ ♦ ♦

SUBCHAPTER K. SPECIAL PROVISIONS FOR NON-CITIZENS

37 TAC §15.171

The Texas Department of Public Safety (Department) proposes new Subchapter K, §15.171, concerning the issuance of driver licenses and identification certificates to non-citizens.

The Public Safety Commission directed the Driver License Division to draft a rule requiring applicants who are not citizens or lawful permanent residents of the United States to present proof of their lawful status in order to obtain a Texas driver license or identification certificate. (For ease of reading, driver licenses and identification certificates are hereinafter collectively referred to as a "license" or "licenses.")

A state-issued driver license or identification certificate is a key link to public safety, privacy and national security. For the safety, security and peace of mind of its residents, Texas must produce a recognizably reliable source of identification in issuing licenses and, at the same time, reduce exposure to identity theft and fraud. To protect the integrity of Texas licenses, the Department believes it must make permanent changes that strengthen identity and residency requirements.

The Department proposes this rule to verify residency in the State, to enhance security and identity features of state-issued licenses, and to address issues of fraud and misrepresentation in the application process. Licenses are routinely used by the Department, financial institutions, retailers, law enforcement, and other entities to establish a cardholder's identity. Accordingly, the proposed rule is necessary to help protect the integrity of Texas licenses for those who rely upon the licenses' authenticity.

A case recently prosecuted by the United States Attorney's Office revealed that the Texas driver license issuance system has a problem in that the license expiration extends beyond the expiration of an individual's authorized admission period. The U.S. Attorney's Office has pointed out that the state-issued driver license is nationally recognized as an identity card, and that a license that is valid beyond the expiration of an individual's authorized admission period provides cover to individuals who are not lawfully in the country. In addition, the case exposed that a loophole in Texas statute was being exploited by individuals

from other states to obtain a Texas license to overstay their authorized admission period and avoid immigration enforcement.

Currently, applicants for a Texas driver license or identification certificate are not required to provide proof of lawful admission status in the United States to establish residency in Texas. An applicant can claim to be a resident of the State by merely attesting to a residence address on the application for a Texas driver license or identification certificate. This prevents the Department from ensuring that licenses are issued only to applicants who are lawfully residing in the State. It is not reasonable for the Department to issue a license to an applicant based on the applicant's declaration of residency in the State without requiring valid documentation indicating authorization for the individual to be in the United States. Therefore, the proposed rule is necessary to ensure that the Department issues licenses only to individuals who are legally present in the United States and who do not misrepresent being a resident of the State. Additionally, it is necessary to link state residency to federal legal presence standards to ensure that the issuance and subsequent use of state-issued licenses do not undermine national security.

Further, Texas Transportation Code, §521.0305 requires a person from a foreign country that has an agreement with the Department under this section to present to the Department documentation issued by the United States agency responsible for citizenship and immigration authorizing the person to be in the United States before the person may be issued a driver license under the agreement. It is not reasonable that individuals from foreign countries that have an agreement with the Department be required to present documentation demonstrating lawful presence in the United States, while all other applicants who are not citizens of the United States or who are from foreign countries that do not have an agreement with the Department are not required to present such documentation. The proposed rule is necessary to ensure that all applicants who are not citizens of the United States comply with the same requirements and are treated in the same manner.

Accordingly, the proposed rule provides the Department the ability to require applicants with lawful status to present valid documentation demonstrating such lawful status and thus ensuring that licenses are issued only to applicants who are eligible for a Texas driver license or identification certificate. An individual with lawful temporary admission status of at least six months would be issued a license that displays the end date of the admission period authorized by the U.S. government. An individual who is not legally present in the United States because the individual has entered the country without permission or has stayed beyond the period authorized by federal authorities, or an individual whose lawful admission period is less than six months, will not be granted a license.

In addition, the proposed rule requires a cardholder whose lawful status has been updated or extended to present valid documentation of such status change or extension before a duplicate license will be issued. This in effect provides the Department the ability to ensure that the cardholder is still eligible for and entitled to the license. The license will be cancelled if the cardholder is unable to present valid documentation that indicates federal approval to remain in the United States beyond the status date.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. The cost to individuals who are required to comply with the rule as proposed will be the standard cost of obtaining a Texas driver license or identification certificate. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be enhancing public safety and homeland security; aiding law enforcement; and ensuring the integrity of state-issued driver license and identification certificates.

The Department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Written comments on the proposal may be submitted to Susana Esparza, Staff Attorney, Driver License Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0300; by fax to (512) 424-5233; or by email to Susana.Esparza@txdps.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

A public hearing is scheduled for Tuesday, July 15, 2008, from 9:00 a.m. to 12:00 p.m. at the Texas Department of Public Safety Headquarters, CLE Auditorium, located at 6100 Guadalupe Street, Building E, Austin, Texas 78752. Persons requiring further information, special assistance, or accommodations should contact Natalie Acevedo at (512) 424-5232.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.005, authorizing the department to adopt rules to administer the issuance of driver licenses and personal identification cards, including information required to be furnished by applicants.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 and §521.142 are affected by this proposal.

§15.171. Issuance of Driver Licenses and Identification Certificates to Non-citizens.

(a) An applicant who is not a citizen or lawful permanent resident of the United States must present valid documentation issued by the United States Department of Justice, United States Department of State, United States Department of Homeland Security, United States Immigration and Naturalization Service, United States Bureau of Citizenship and Immigration Services, or any successor agency of the aforementioned that shows lawful temporary admission to the United States.

(1) An applicant whose lawful admission period is more than six months but less than the full term of a driver license or identification certificate will be issued a driver license or identification certificate with a status date displayed that coincides with the expiration of the applicant's lawful admission period in the United States.

(2) If the lawful admission period in the United States indicated on the document presented by the applicant expires in less than six months from the date of application, no driver license or identification certificate may be issued.

(3) If the document presented by the applicant to demonstrate lawful temporary admission indicates an indefinite expiration date, the driver license or identification certificate will be issued with a status date displayed of one year from the date of application.

(b) In the event the applicant's status is updated or extended, the applicant must present valid documentation of such status change or extension to obtain a duplicate driver license or identification certificate with an updated status date.

(c) The driver license or identification certificate will be cancelled if within 45 days from the status date the applicant is unable to present valid documentation showing a status change or extension of admission period.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803249
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 3, 2008
For further information, please call: (512) 424-2135

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER B. REGULATION OF LICENSES

7 TAC §25.25

The Finance Commission of Texas, on behalf of the Texas Department of Banking, withdraws the proposed repeal of §25.25 which appeared in the December 28, 2007, issue of the *Texas Register* (32 TexReg 9894).

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803186
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: June 20, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

7 TAC §25.25

The Finance Commission of Texas, on behalf of the Texas Department of Banking, withdraws proposed new §25.25 which appeared in the December 28, 2007, issue of the *Texas Register* (32 TexReg 9895).

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803187
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: June 20, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §153.51

The Finance Commission of Texas and the Texas Credit Union Commission jointly withdraws the proposed amendments to §153.51 which appeared in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2101).

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803264
Leslie L. Pettijohn
Commissioner
Joint Financial Regulatory Agencies
Effective date: June 23, 2008
For further information, please call: (512) 936-7640

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 291. UTILITY REGULATIONS

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §291.14

The Texas Commission on Environmental Quality withdraws the proposed amendments to §291.14 which appeared in the February 1, 2008, issue of the *Texas Register* (33 TexReg 871).

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803193
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: June 20, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER J. ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

30 TAC §291.144

The Texas Commission on Environmental Quality withdraws the proposed amendments to §291.144 which appeared in the February 1, 2008, issue of the *Texas Register* (33 TexReg 871).

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803194

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: June 20, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 69. CENTRAL PURCHASING

SUBCHAPTER A. PROCEDURES FOR VENDOR PROTESTS OF PROCUREMENTS

1 TAC §69.1

The Office of the Attorney General (OAG) adopts the amendments to Texas Administrative Code, Title 1 Administration, Part 3 Office of the Attorney General, Chapter 69 Central Purchasing, Subchapter A Procedures for Vendor Protests of Procurements, §69.1 without changes to the proposed text, as published in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4057), and therefore the section will not be republished. The amendments are necessary to due to enactment of House Bill 3560 during the 80th legislative session, which transferred the procurement functions of the former Texas Building and Procurement Commission under Government Code, Chapter 2155, Chapter 2156, Chapter 2157 and Chapter 2158 to the Comptroller of Public Accounts, effective September 1, 2007. The amendments update references to the former Texas Building and Procurement Commission by replacing them with references to the Comptroller of Public Accounts.

No comments were received regarding the proposed amendments.

The amendments to this rule are adopted in accordance with Government Code §2155.076, which requires state agencies to adopt procedures for resolving vendor protests relating to purchasing issues.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803251
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: July 13, 2008
Proposal publication date: May 23, 2008
For more information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1861.

♦ ♦ ♦

SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

1 TAC §69.25

The Office of the Attorney General (OAG) adopts the amendments to Texas Administrative Code, Title 1 Administration, Part 3 Office of the Attorney General, Chapter 69 Central Purchasing, Subchapter B Historically Underutilized Business Program, §69.25 without changes to the proposed text, as published in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4057), and therefore the section will not be republished. These amendments are necessary due to enactment of House Bill 3560 during the 80th legislative session, which transferred the authority for administration of Government Code Chapter 2161, regarding Historically Underutilized Businesses, from the former Texas Building and Procurement Commission to the Comptroller of Public Accounts, effective September 1, 2007. The amendments update references to the former Texas Building and Procurement Commission by replacing them with references to the Comptroller of Public Accounts.

No comments were received regarding the proposed amendments.

The proposed amendments to this rule are authorized in accordance with Government Code §2161.003, which requires state agencies to adopt the rules of the Comptroller of Public Accounts regarding Historically Underutilized Businesses under Government Code §2161.002 as its own.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803252
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: July 13, 2008
Proposal publication date: May 23, 2008
For more information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

♦ ♦ ♦

TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 15. CORPORATE ACTIVITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts new §§15.9 - 15.12; amendments to §15.6 and §15.8; and, repeal of §15.9. These rules concern fees and other provisions of general applicability related to corporate activities. The commission also adopts the repeal of §15.112, concerning waiver of requirements. These adoptions are made without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3509). The text will not be republished.

These new and amended rules implement legislative changes resulting from the passage of House Bill (HB) 1962 and HB 2754, 80th Texas Legislature. The new and amended rules concern the method for protesting bank charter applications, the Banking Commissioner's (commissioner) discretion to convene a hearing in regard to bank charter applications, and the filing of corporate documents under the Texas Business Corporations Act (TBCA) or the Texas Business Organizations Code (TBOC). The new and amended rules make Chapter 15 consistent with the amended statutes.

Chapter 15, Subchapter A, implements Finance Code §§32.001 - 32.008 by setting out details regarding filing fees, corporate filings, and processing applications for bank charters. The amendment to §15.6 arises from that part of HB 2754 which was codified as Finance Code §32.005. Section 15.6(b) specifies that the department will notify the applicant of any protest. Section 15.6(c) is amended to clarify that the commissioner may convene a hearing whether or not a protest is filed, and that if the commissioner does so, the 180 day deadline for acting on an application does not apply. Section 15.6(c) is also amended to refer the reader to new §15.10, which governs procedures for protests.

The amendment to §15.8(a) arises from the Legislature's enactment of the Texas Business Organizations Code (TBOC) in 2003. As part of the state's continuing statutory revision program under Chapter 323 of the Government Code, the TBOC collected and codified the organizational statutes of Texas governing for-profit and non-profit private-sector entities, including the Texas Business Corporation Act, the Texas Miscellaneous Corporation Laws Act, and the Texas Limited Liability Company Act, among others. The TBOC became effective January 1, 2006. In 2007, the Legislature passed HB 1962, part of which is codified as Finance Code §32.008. Finance Code §32.008(a) makes the TBOC generally applicable to banking associations. Finance Code §32.008(d) states that, until January 1, 2010, a bank organized before January 1, 2006 can choose to be governed by the former law, the TBCA. Therefore, §15.8(a) is amended to clarify that, until January 1, 2010, banks organized before January 1, 2006 may file corporate documents pursuant to the TBCA.

The amendment to §15.8(d) adds paragraphs (3) to (5) and makes §15.8(d) consistent with Finance Code §201.103. Finance Code §201.103 authorizes a bank to file a statement with the secretary of state regarding the appointment, change or cancellation of an appointment of an agent to receive process.

New §15.9, like §15.8, arises from the Legislature's enactment of the TBOC in 2003. As stated above, Finance Code §32.008(a) makes the TBOC generally applicable to banking associations. After January 1, 2010, all state banks will be governed by the TBOC. Therefore, §15.9 follows the format of §15.8 and specifies the type of filings a state bank may make in compliance with the TBOC and whether those filings should be made with the secretary of state or the commissioner.

New §15.10 details the procedures for handling protests of applications of new bank charters. These procedures were revised by the Legislature in HB 2754 and are codified as Finance Code §32.005(a) and (b).

New §15.11 details procedures for requesting hearings, clarifies that the commissioner has discretion whether or not to convene a hearing, and states how a hearing shall be conducted. These procedures were revised by the Legislature in HB 2754 and are codified as Finance Code §32.005(c).

New §15.12 was formerly numbered §15.9. The text has been moved so that it remains the last section of Subchapter A for better organization.

The Department received no comments regarding the proposed sections.

SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

7 TAC §§15.6, 15.8 - 15.12

The amendments and new sections are adopted under Finance Code §11.301, which provides that the commission may adopt banking rules as provided by Finance Code §31.003; under Finance Code §31.003(a), which provides that the commission may adopt rules to accomplish the purposes of the banking statutes, including rules necessary or reasonable to implement and clarify banking statutes and to facilitate the fair hearing and adjudication of matters before the commissioner; under Finance Code §32.005, which establishes the procedure for protests and hearings of bank charter applications; under Finance Code §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 32 of the Finance Code and permitting a state bank to elect to be governed by the provisions of the TBOC to the extent not inconsistent with Subtitle A of Title 3 of the Finance Code or the proper business of a state bank; and, under Finance Code §201.103, which authorizes Texas financial institutions to file documents with the secretary of state regarding appointments of agents to receive service of process.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803177
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

7 TAC §15.9

The repeal is adopted under Finance Code §11.301, which provides that the commission may adopt banking rules as provided by Finance Code §31.003; under Finance Code §31.003(a), which provides that the commission may adopt rules to accomplish the purposes of the banking statutes, including rules

necessary or reasonable to implement and clarify banking statutes and to facilitate the fair hearing and adjudication of matters before the commissioner; under Finance Code §32.005, which establishes the procedure for protests and hearings of bank charter applications; and, under Finance Code §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 32 of the Finance Code and permitting a state bank to elect to be governed by the provisions of the TBOC to the extent not inconsistent with Subtitle A of Title 3 of the Finance Code or the proper business of a state bank.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803178
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER F. APPLICATIONS FOR MERGER, CONVERSION, AND PURCHASE OR SALE OF ASSETS

7 TAC §15.112

The repeal is adopted under Finance Code §11.301, which provides that the commission may adopt banking rules as provided by Finance Code §31.003; under Finance Code §31.003(a), which provides that the commission may adopt rules to accomplish the purposes of the banking statutes, including rules necessary or reasonable to implement and clarify banking statutes and to facilitate the fair hearing and adjudication of matters before the commissioner; and, under Finance Code §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 32 of the Finance Code and permitting a state bank to elect to be governed by the provisions of the TBOC to the extent not inconsistent with Subtitle A of Title 3 of the Finance Code or the proper business of a state bank.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803179
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

CHAPTER 21. TRUST COMPANY CORPORATE ACTIVITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts new §§21.9 - 21.12; amendments to §§21.6, 21.8, 21.63, and 21.91; and repeal of §21.9. These rules concern fees and other provisions of general applicability related to trust company corporate activities. These adoptions are made without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3513). The text will not be republished.

These new and amended rules implement legislative changes resulting from the passage of House Bill (HB) 1962 and HB 2754, 80th Texas Legislature. The new and amended rules concern the method for protesting trust charter applications, the Banking Commissioner's (commissioner) discretion to convene a hearing in regard to trust charter applications, and the filing of corporate documents under the Texas Business Corporations Act (TBCA) or the Texas Business Organizations Code (TBOC). The new and amended rules make Chapter 21 consistent with the amended statutes.

Chapter 21, Subchapter A, implements Finance Code §§182.001 - 182.009 by setting out details regarding filing fees, corporate filings, and processing applications for trust charters.

The amendment to §21.6 arises from that part of HB 2754 which was codified as Finance Code §182.005. Section 21.6(b) specifies that the department will notify the applicant of any protest. Section 21.6(c) is amended to clarify that the commissioner may convene a hearing whether or not a protest is filed, and that if the commissioner does so, the 180 day deadline for acting on an application does not apply. Section 21.6(c) is also amended to refer the reader to new §21.10, which governs procedures for protests.

The amendment to §21.8(a) arises from the Legislature's enactment of the Texas Business Organizations Code (TBOC) in 2003. As part of the state's continuing statutory revision program under Chapter 323 of the Government Code, the TBOC collected and codified the organizational statutes of Texas governing for-profit and non-profit private-sector entities, including the Texas Business Corporation Act, the Texas Miscellaneous Corporation Laws Act, and the Texas Limited Liability Company Act, among others. The TBOC became effective January 1, 2006. In 2007, the Legislature passed HB 1962, part of which is codified as Finance Code §182.009. Finance Code §182.009(a) makes the TBOC generally applicable to trust associations. Finance Code §182.009(d) states that, until January 1, 2010, a state trust company organized before January 1, 2006 can choose to be governed by the former law, the TBCA. Therefore, §21.8(a) is amended to clarify that, until January 1, 2010, state trust companies organized before January 1, 2006 may file corporate documents pursuant to the TBCA.

The amendment to §21.8(d) adds paragraphs (3) to (5) and makes §21.8(d) consistent with Finance Code §201.103. Finance Code §201.103 authorizes a financial institution to file a statement with the secretary of state regarding the appointment, change or cancellation of an appointment of an agent to receive process.

New §21.9, like §21.8, arises from the Legislature's enactment of the TBOC in 2003. As stated above, Finance Code §182.009(a) makes the TBOC generally applicable to trust associations. After January 1, 2010, all state trust companies will be governed by the TBOC. Therefore, §21.9 follows the format of §21.8 and specifies the type of filings a state trust company may make in compliance with the TBOC and whether those filings should be made with the secretary of state or the commissioner.

New §21.10 details the procedures for handling protests of applications of new trust company charters. These procedures were revised by the Legislature in HB 2754 and are codified as Finance Code §182.005(a) and (b).

New §21.11 details procedures for requesting hearings, clarifies that the commissioner has discretion whether or not to convene a hearing, and states how a hearing shall be conducted. These procedures were revised by the Legislature in HB 2754 and are codified as Finance Code §182.005(c).

New §21.12 was formerly numbered §21.9. The text has been moved so that it remains the last section of Subchapter A for better organization.

The amendments to §21.63 and §21.91 are to correct a typographical error and to delete a reference to a repealed rule, respectively.

The Department received no comments regarding the proposed sections.

SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

7 TAC §§21.6, 21.8 - 21.12

The amendments and new sections are adopted under Finance Code §181.003(a), which provides that the commission may adopt rules to accomplish the purposes of Subtitle F, Trust Companies, including rules necessary or reasonable to implement and clarify Subtitle F and to facilitate the fair hearing and adjudication of matters before the commissioner; under Finance Code §182.005, which establishes the procedure for protests and hearings of trust company charter applications; under Finance Code §182.009, which authorizes the commission to adopt rules to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 182 of the Finance Code and permits a state trust company to elect to be governed by the provisions of the TBOC to the extent not inconsistent with subtitle F of Title 3 of the Finance Code or the proper business of a state trust company; and, under Finance Code §201.103, which authorizes Texas financial institutions to file documents with the secretary of state regarding appointments of agents to receive service of process.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803180
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

7 TAC §21.9

The repeal is adopted under Finance Code §181.003(a), which provides that the commission may adopt rules to accomplish the purposes of Subtitle F, Trust Companies, including rules necessary or reasonable to implement and clarify Subtitle F and to facilitate the fair hearing and adjudication of matters before the commissioner; under Finance Code §182.005, which establishes the procedure for protests and hearings of trust company charter applications; under Finance Code §182.009, which authorizes the commission to adopt rules to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 182 of the Finance Code and permits a state trust company to elect to be governed by the provisions of the TBOC to the extent not inconsistent with subtitle F of Title 3 of the Finance Code or the proper business of a state trust company; and, under Finance Code §201.103, which authorizes Texas financial institutions to file documents with the secretary of state regarding appointments of agents to receive service of process.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803181
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER F. APPLICATION FOR MERGER, CONVERSION, OR SALE OF ASSETS

7 TAC §21.63

The amendment is adopted under Finance Code §181.003(a), which provides that the commission may adopt rules to accomplish the purposes of Subtitle F, Trust Companies, including rules necessary or reasonable to implement and clarify Subtitle F and to facilitate the fair hearing and adjudication of matters before the commissioner; and, under Finance Code §182.009, which authorizes the commission to adopt rules to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 182 of the Finance Code and permits a state trust company to elect to be governed by the provisions of the TBOC to the extent not inconsistent with subtitle F of Title 3 of the Finance Code or the proper business of a state trust company.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803182

A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

SUBCHAPTER G. CHARTER AMENDMENTS AND CERTAIN CHANGES IN OUTSTANDING STOCK

7 TAC §21.91

The amendment is adopted under Finance Code §181.003(a), which provides that the commission may adopt rules to accomplish the purposes of Subtitle F, Trust Companies, including rules necessary or reasonable to implement and clarify Subtitle F and to facilitate the fair hearing and adjudication of matters before the commissioner; and, under Finance Code §182.009, which authorizes the commission to adopt rules to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 182 of the Finance Code and permits a state trust company to elect to be governed by the provisions of the TBOC to the extent not inconsistent with subtitle F of Title 3 of the Finance Code or the proper business of a state trust company.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803183
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 475-1300

♦ ♦ ♦

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER B. INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §84.209

The Finance Commission of Texas (commission) adopts the repeal of 7 TAC §84.209, concerning Model Clauses. The repeal is adopted without changes to the proposal as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3517).

The commission has determined that this rule more effectively belongs in a different location within Chapter 84 in order to better track the organization of Texas Finance Code, Chapter 348. Therefore, this rule is being repealed and a new (relocated) rule is adopted elsewhere in this issue of the *Texas Register*.

The commission received no written comments on the proposed repeal.

The repeal is adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 authorizes the commission to adopt rules for the enforcement of the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the repeal are contained in Texas Finance Code, Chapter 348.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803219
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER C. SALES FINANCE OPERATIONS

7 TAC §84.302

The Finance Commission of Texas (commission) adopts the repeal of 7 TAC §84.302, concerning Prepaid Maintenance Agreements. The repeal is adopted without changes to the proposal as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3518).

The commission has determined that this rule more effectively belongs in a different location within Chapter 84 in order to better track the organization of Texas Finance Code, Chapter 348. Therefore, this rule is being repealed and a new (relocated) rule is adopted elsewhere in this issue of the *Texas Register*.

The commission received no written comments on the proposed repeal.

The repeal is adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 authorizes the commission to adopt rules for the enforcement of the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the repeal are contained in Texas Finance Code, Chapter 348.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803222

Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER C. INSURANCE

7 TAC §§84.302 - 84.305, 84.307

The Finance Commission of Texas (commission) adopts new §§84.302 - 84.305 and 84.307, concerning Insurance, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. The commission adopts §§84.302 - 84.304 with changes and §84.305 and §84.307 without changes from the proposal published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3518). Sections 84.302 - 84.304 will be republished.

The commission received no written comments on the proposal. The agency has, however, revised several provisions as a result of informal comments received. These revisions are summarized following the particular purpose of the rule to reflect changes made since the proposal.

The new rules (§§84.302 - 84.305) contain new operational provisions regarding insurance. The purpose of the new operational rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process.

Section 84.307 is being relocated and reorganized. The agency believes that the reorganization will benefit licensees in that this rule will be easier to find in a more logical location and order which better tracks the organization of Texas Finance Code, Chapter 348. The relocated rule is substantially similar to the rule being repealed, as found in 7 TAC §84.302, concerning Prepaid Maintenance Agreements. The commission's adopted repeal of this section is published elsewhere in this issue of the *Texas Register*.

In reference to the relocated rule, the purpose of the rule tracks the original purpose language used when it was originally adopted. Please note that, aside from changes to section number references, the new rule contained in §84.307 is merely being relocated without changes.

The following paragraphs outline the individual purposes of each adopted rule. The relocated rule is listed with its former location "(former §84.XXX)" listed after the new section number.

Section 84.302 describes the basic requirements and types of credit insurance authorized to be sold where a charge for insurance is included in the balance due under a retail installment sales contract for a motor vehicle. The rule is necessary to prescribe these types of insurance and require compliance with the applicable statutes contained in the Texas Insurance Code.

In response to informal comments received, subsection (a) has been added to §84.302 in order to clarify the scope and applicability of the section. Section 84.302(a) outlines that the section only applies "where a charge for insurance is included in the balance due under the retail installment sales contract" and that it "does not apply to insurance sold outside of the retail installment sales transaction." Additionally, the remaining subsections have been relettered accordingly.

Also addressing informal comments, subsection (b) (proposed subsection (a)) has been revised to clarify the optional nature of authorized credit insurance products. The additional sentence in §84.302(b) reads: "The retail seller may but is not required to offer the authorized credit insurance products described in this section."

Section 84.303 outlines the required elements that must be included in a policy or certificate of insurance sent to the retail buyer if a retail seller obtains insurance for which a charge is included in a motor vehicle retail installment sales contract. This rule is necessary to prescribe the specific information required to be disclosed to the retail buyer and to provide for a reasonable time frame in which the information is to be disclosed.

Since the proposal, the first sentence of §84.303 has been revised in order to address informal comments received. The new language clarifies that the policy or certificate of insurance must be sent to the retail buyer "{i}f a retail seller obtains insurance for which a charge is included in a motor vehicle retail installment sales contract . . . ." This revision echoes the applicability provision added to §84.302 as new subsection (a) relating to the inclusion of charges in the balance due under the contract. Also, the word "provide" has been replaced with the phrase "send or cause to be sent" in order to track the statutory language in Texas Finance Code, §348.210.

Section 84.304 requires that if a retail buyer provides a holder with equivalent property insurance coverage that names the holder as a loss payee, the holder must cancel any equivalent property insurance.

In response to an informal comment, the word "already" has been added before the word "purchased" in the first sentence of §84.304. The addition of "already" serves to clarify the prior purchase of insurance through the holder.

Section 84.305 provides that if a holder arranges for collateral protection insurance and assesses a charge for the insurance to the retail buyer, the holder must comply with Texas Finance Code, Chapter 307.

Section 84.307 (former §84.302) outlines the methods of disclosure on a retail installment sales contract for prepaid maintenance agreements sold in connection with motor vehicles. Prepaid maintenance agreements that are required or otherwise included with the sale of a motor vehicle must be disclosed as a component of the cash price. Those agreements sold on a voluntary basis may be disclosed under two methods specified in the rule.

As noted earlier, §84.307 is merely being relocated without changes to the rule text that has been in place since August 2006. The agency has not experienced any problems with this section and believes that its continuation is important. When originally drafted, this section was intended to aid dealers in the disclosure of prepaid maintenance agreements. Additionally the section was designed to target subterfuges and devices using prepaid maintenance agreements that attempted to evade the statutory requirements of Chapter 348. In particular, the agency was concerned about concealing hidden finance charges in required prepaid maintenance agreements. Some informal concerns have been expressed about this section and the agency's use of the section. The rule informs the industry that the agency may review the sale of prepaid maintenance agreements to

determine whether the sale includes a hidden finance charge. The review of a prepaid maintenance agreement would be a totality of the circumstances review; this is the typical type of analysis used for any type of subterfuge.

These new sections are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter. These rules affect Texas Finance Code, Chapter 348.

§84.302. Authorized Credit Insurance.

(a) This section only applies to a motor vehicle retail installment sales transaction under Texas Finance Code, Chapter 348 where a charge for insurance is included in the balance due under the retail installment sales contract. This section does not apply to insurance sold outside of the retail installment sales transaction.

(b) Authorized credit insurance includes credit life, credit accident and health insurance, credit involuntary unemployment insurance, and dual-interest gap insurance. The retail seller may but is not required to offer the authorized credit insurance products described in this section.

(c) Credit life insurance, credit accident and health insurance, and involuntary unemployment insurance written in connection with a Texas Finance Code, Chapter 348 motor vehicle retail installment sales contract must be decreasing term insurance.

(d) Credit life insurance and credit accident and health insurance must be written in compliance with Texas Insurance Code, Chapters 1131 and 1153, and any regulations issued by the Texas Department of Insurance under the authority of those provisions.

(e) Involuntary unemployment insurance must be written in compliance with Texas Insurance Code, Chapter 3501, and any regulations issued by the Texas Department of Insurance under the authority of that chapter.

(f) Dual-interest gap insurance, authorized by Texas Finance Code, §348.208(b)(4), must be written at rates and on forms set and filed in accordance with Texas Insurance Code, Chapters 2251 and 2301, and any regulations issued by the Texas Department of Insurance under the authority of those provisions.

(g) Credit insurance must be procured from an insurance company authorized to do business in this state. Surplus lines insurance companies are not authorized to offer credit insurance on a Chapter 348 motor vehicle retail installment sales contract.

(h) Debt cancellation, debt suspension, and gap waiver agreements are not credit insurance. Debt cancellation, debt suspension, and gap waiver agreements are not authorized to be sold or written with a Chapter 348 motor vehicle retail installment sales contract.

§84.303. Provision of Policy or Certificate.

If a retail seller obtains insurance for which a charge is included in a motor vehicle retail installment sales contract under Texas Finance Code, Chapter 348, the retail seller must send or cause to be sent to the retail buyer, within 30 days of the date of the contract, a properly executed policy or certificate of insurance. The policy or certificate of insurance must clearly set forth:

(1) the amount of the premium;

(2) the kind of insurance provided;

(3) the coverage of the insurance; and

(4) all terms, including options, limitations, restrictions and conditions of the insurance that has been purchased.

§84.304. Evidence of Equivalent Insurance.

If a retail buyer provides a holder with evidence of property insurance coverage that names the holder as a loss payee and that is equivalent to insurance already purchased through the holder, the holder must promptly cancel any equivalent property insurance or collateral protection insurance. The refund of any unearned insurance premium must be applied to the balance of the contract or refunded to the retail buyer.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803210
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER E. HOLDER'S RIGHTS, DUTIES, AND LIMITATIONS

7 TAC §§84.501, 84.503, 84.504

The Finance Commission of Texas (commission) adopts new §§84.501, 84.503, and 84.504, concerning Holder's Rights, Duties, and Limitations, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. The commission adopts these sections with changes from the proposal published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3520).

The commission received one written comment on the proposal from McGinnis, Lochridge & Kilgore, L.L.P. on behalf of GMAC LLC. Overall, the comment is supportive of the rules, stating: "GMAC supports effective regulation of the industry, and the proposals provide a number of revisions that will facilitate compliance. GMAC's comments are limited to two subsections of section 84.501, with respect to which it submits that further modifications are needed." The specific comments are addressed following the individual purpose of the provision at issue. Additionally, the agency has revised several provisions as a result of informal comments received. These revisions are summarized following the particular purpose of the rule to reflect changes made since the proposal.

The new rules contain new operational provisions regarding payoff statements, and collection practices and contacts. The purpose of the rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. The following paragraphs outline the individual purposes of each adopted rule.

Section 84.501 requires a holder to give a retail buyer a payoff statement on written request of the retail buyer. This provision is necessary to enable a retail buyer to prepay the debt at any time in accordance with Chapter 348. The rule also outlines the content of the payoff statement and what is considered to be a

reasonable time in which to give a payoff statement for different types of accounts.

Due to informal comments received, §84.501 has experienced several changes that will be addressed concerning each subsection having revisions. The official comment received relates to §84.501(j) and (k).

The first change is the addition of new subsection (a) containing definitions to be used throughout the section. Section 84.501(a)(1) clarifies that the use of the term "holder" in the section means "[a] holder with the legal authority to release the security interest, or the holder's designee who has the legal authority to release the security interest." Holders without the legal authority to release the lien are excluded from the requirements of §84.501. "Calendar days" has also been defined in §84.501(a)(2) to include "[e]very day of the week with the exclusion of legal public holidays as defined by 5 U.S.C. §6103." This definition is intended to help alleviate delivery time constraints surrounding legal public holidays. As a result of new subsection (a), the remaining subsections have been relettered accordingly.

In the subsection relating to requesting a statement, §84.501(e) (proposed subsection (d)), the second and third sentences have been revised in order to streamline the wording. Concerning the use of websites and email for requests, the following sentence has been added: "A website address or email address is presumed to be reasonably accessible, unless the retail buyer objects in writing." In order to address large businesses having many locations and methods of contact, revisions have been made to allow the use of "contact information included in the most recent communication from the holder related to payments or the contact information for that holder shown in the retail installment sales contract." Thus, subsection (e) as presented for adoption states that the retail buyer may first submit a request to the location designated by the holder, but if no location has been designated, the retail buyer may use the most recent contact information or that shown on the contract, and lastly, the retail buyer may "submit the request to any physical address or mailing address of holder."

In the subsection regarding content of the payoff statement, §84.501(g) (proposed subsection (f)), the phrase "for use in connection with the payoff statement" has been added to paragraphs (2) and (3) to address the concerns of large businesses having many locations and methods of contact. Additions to paragraph (6) clarify that the payoff amount is "as of the stated date of the payoff statement," that the creditor must indicate if the amount is subject to change, and that the statement may "include a description of the daily accrual of finance charges and known and identified subsequent events." These changes are intended to provide the holder and retail buyer with the most clarity concerning the content of the payoff statement.

In §84.501(h) and (i) (proposed subsections (g) and (h)), in each respective first sentence, the phrase "or buyer's designee" has been added after "retail buyer." Concerning subsection (h) relating to delivery of a payoff statement, the following sentence has been added: "A payoff statement or statement of payments given by email or by website address from which the statement may be printed satisfies the writing requirement of this subsection." This addition is to clarify that holders may utilize electronic delivery methods to give written statements when the statements may be printed. This revision provides holders greater flexibility and prompt delivery options for written statements.

Regarding the subsection relating to reasonable time period, §84.501(j) (proposed subsection (i)), the official comment received states that the references to litigation and bankruptcy should be removed from paragraph (1), which requires that statements be given in five calendar days for accounts in litigation, bankruptcy or repossession status. The commenter states: "Since accounts involved in litigation and bankruptcy would already be subject to procedural rules of the respective courts and would be supervised by the courts, GMAC believes that it would be a better practice to allow the courts to determine what constitutes a reasonable time for furnishing the statements."

Texas Finance Code, §348.408 states: "The holder of a retail installment contract who gives the retail buyer or the buyer's designee outstanding balance information relating to the contract is bound by that information and shall honor that information for a reasonable time." The statute does not create any exceptions, including the one sought by the commenter. The commission does not have the authority to make an exception that goes beyond the statutory requirement. Furthermore, the five-day timeline is the same as that required under 15 U.S.C. §1615, the federal payoff rule for precomputed consumer credit accounts. The federal rule does not contain any exclusion for litigation, bankruptcy, or otherwise. Thus, the commission declines to allow an exception for litigation or bankruptcy accounts as requested by the commenter.

Although the commission is unable to add a specific litigation/bankruptcy exception as outlined in the preceding paragraphs, other revisions have been made to §84.501(j) that the commission believes will help alleviate the commenter's concerns. In the first sentence of subsection (j), the word "presumptively" has been added before reasonable time, coordinating with new paragraph (5), which states: "The reasonable time periods defined by this subsection are presumed to be reasonable and may only be rebutted by a showing of good cause." The rule provides a rebuttable presumption for good cause in the absence of a statutory exception for bankruptcy or litigation. This rebuttable presumption provides the creditor with an opportunity to show the need for more than five calendar days under complex circumstances. Also, as stated under new subsection (a) containing definitions, calendar days has been modified to exclude legal public holidays. This revision has also been added to §84.501(j)(1) to reinforce the definition of calendar days in the context of the reasonable time period subsection.

In response to informal comments received, revisions have been made to paragraph (3) and paragraph (4) has been added to §84.501(j). The changes to paragraph (3) serve to clarify the wording by adding the use of "the holder" and the phrase "determine the proper account" relating to verifying the requester's identity. New paragraph (4) is similar to the legal service concept known as "the mailbox rule," stating: "The holder's response is timely if placed in first-class U.S. mail, given by facsimile or email, or otherwise transmitted within the reasonable time period."

Regarding the subsection relating to how long a payoff statement is binding, §84.501(k) (proposed subsection (j)), the official comment requests the addition of delivery via website to subsection (k)(1). The commenter states: "GMAC now provides most payoff statements on its website, and delivery of the statement via a holder's website is in the same category of promptness as delivery via hand-delivery, facsimile, or email. . . . . The proposed modification would clarify that furnishing a payoff state-

ment via a holder's website would be subject to the 10 day period of §84.501(k)(1) rather than the 15 day period of §84.501(k)(2)." The commission agrees with this revision and has added "or website" after "email" in subsection (k)(1) for this adoption.

In order to address informal comments received, the phrase "from the date the payoff statement is given" has been added to the end of §84.501(k)(1) and (2) to further clarify when a payoff statement is binding.

Additionally, throughout §84.501 all uses and variants of the verb "provide" have been replaced with the verb "give" in order best track the statutory language contained in Texas Finance Code, §348.408 relating to payment in full. Although Texas Finance Code, §348.405 relating to statement of payments offers an alternative verb, §348.405 and §348.408 both use forms of "give" in connection with giving the information to the retail buyer. Thus, in addition to replacing "provide," other terminology such as "respond to an inquiry for" and "processing" has also been replaced with the proper form of "give" to maintain consistency throughout the section.

Section 84.503 addresses the allowable collection practices of motor vehicle sales finance licensees, including a prohibition on the use of any physical force or violence against any person or property.

In response to informal comments received, the phrase "or other applicable law" has been added to the end of §84.503(a) to reflect the possible applicability of laws outside of Texas. Regarding violence against property, the end of subsection (b) has been clarified to read: "or use any violence or other force that results in harm or damage to property." This revised phrase is intended to encompass actions such as breaking a lock or damaging a vehicle, but would not include a peaceful towing where the vehicle is not harmed or damaged.

Section 84.504 outlines who may be contacted regarding a debt subject to Texas Finance Code, Chapter 348, and when a licensee may communicate with a retail buyer. The rule limits the communication restrictions according to each particular retail buyer and that buyer's specific debt under a motor vehicle retail sales installment contract. The rule prohibits the use of any simulated legal process and the misrepresentation of the identity of the licensee.

Due to informal comments received, §84.504 has experienced several revisions, some of which are echoed in more than one subsection. For example, in order to reflect the restriction of collection contacts in relation to a specific retail buyer and particular account, language to that effect has been added to subsections (a) and (d). Also, as some buyers or co-buyers often have the same telephone number or physical address (e.g., husband and wife), the term "deliberate communication" has been added to subsection (a) and the corresponding term "knowingly" has been added to subsection (d) to accommodate accidental contact with an objecting buyer when an attempt is made to contact a non-objecting buyer. Finally, some additional changes in wording have been made to §84.504(a) and (d) to improve clarity and coordinate with the revisions outlined in this paragraph.

In subsection (b), the phrase related to a guarantor now reads "or guarantor of the obligation" and the phrase "or a refund" has been inserted before "involving the debtor or motor vehicle" in order to provide more accurate wording. The phrase associated with an executor or administrator of a will has been deleted, but new language has been added at the end of the subsection that more broadly addresses executors and administrators for estates with or without a will, as well as other parties that may be contacted for payment. Thus, the end of §84.504(b) now reads: "any person who may be or is legally obligated to pay all or a portion of the debt, or a guardian, executor, administrator, attorney, agent, or representative of any of the foregoing."

Subsection (e) has been revised in order to best reflect the proper context of a collection contact, to more accurately describe the restricted information, and to better outline the parties that may lawfully receive the information pertaining to a debt or obligation. Regarding the collection context, the following phrase has been added after "jurisdiction": "in connection with the collection of amounts due under a motor vehicle retail installment sales contract." Continuing on after the preceding new phrase, the information is appropriately narrowed so that "a licensee may not communicate nonpublic personal information pertaining to a debt or obligation . . . ." And finally, in order to best describe the parties that may lawfully receive this information, after "the attorney of the creditor," the end of the first sentence of §84.504(e) now reads as follows: "a guardian, executor, or administrator, or any party that may lawfully receive the information under the Gramm Leach Bliley Act, 15 U.S.C. §6801, *et seq.*, and its implementing regulations, or the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq.*, and its implementing regulations, or other law or regulation."

New subsection (f) has been added to §84.504 in order to address contacts made "directly relating to a pending court or arbitration proceeding." Subsection (f) further states: "Subsections (a), (b), (d), and (e) of this section do not apply to providing a notice required by law or contract." As a result, proposed subsections (f) and (g) have been relettered as subsections (g) and (h) respectively.

Regarding the prohibition of identity misrepresentation, in §84.504(h) (proposed subsection (g)), the phrase "nor shall a licensee or licensee's agent misrepresent the identity of the licensee" has been replaced with the following sentences: "A licensee or a licensee's agent must not use any fictitious name unless the name used is an established or recognized trade name of the licensee or the licensee's agent. The preceding sentence does not apply to individual employees or representatives of the licensee, so long as the licensee maintains a system to determine the identity of the person contacting the obligor." The first sentence permits the use of established or recognized trade names to enable more prompt recognition by retail buyers without constituting misrepresentation. As authorized by Texas Finance Code, §392.304(a)(6) and (c), the second sentence clarifies that a licensee is not required to disclose the names and addresses of its employees.

The new sections are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter. These rules affect Texas Finance Code, Chapter 348.

§84.501. Payoff Statement or Statement of Payments.

(a) Definitions. For purposes of this section, the following terms will have the following meanings:

(1) Holder--A holder with the legal authority to release the security interest, or the holder's designee who has the legal authority to release the security interest.

(2) Calendar days--Every day of the week with the exclusion of legal public holidays as defined by 5 U.S.C. §6103.

(b) Payoff statement. On the written request of the retail buyer or the buyer's designee, a holder must give a payoff statement to the person making the request within a reasonable time.

(c) Statement of payments. On the written request of the retail buyer or the retail buyer's designee, a holder must give a statement of the dates and amounts of payments and the total amount unpaid under the contract to the person making the request within a reasonable time.

(d) Delinquent accounts. A holder must give the information required by this section even if at the time the inquiry is made the account is delinquent.

(e) Requesting statement. A holder may designate a location where the person requesting a payoff statement or statement of payments may submit a request for the statement. The designation may include a mailing address, physical address, telephone number, website address, email address, or another point of contact reasonably accessible to the retail buyer or buyer's designee. A mailing address and telephone number are presumed to be reasonably accessible. A website address or email address is presumed to be reasonably accessible, unless the retail buyer objects in writing. If the holder does not designate a location where the retail buyer or buyer's designee may request a payoff statement or statement of payments, the retail buyer or buyer's designee may submit the written request using the contact information included in the most recent communication from the holder related to payments or the contact information for that holder shown in the retail installment sales contract. If the holder has not provided contact information in either manner described by the preceding sentences, the retail buyer or buyer's designee may submit the request to any physical address or mailing address of the holder.

(f) Verification of retail buyer. The holder may require the retail buyer to provide certain specified information (full name of the retail buyer, social security number, account number, unique password given to the retail buyer) to verify the requester's identity before giving the payoff statement or statement of payments.

(g) Content of payoff statement. The payoff statement must, at a minimum, contain the following information:

(1) the name of the holder;

(2) the address of the holder for use in connection with the payoff statement;

(3) the telephone number of the holder for use in connection with the payoff statement;

(4) the account number or other identifying number of the retail buyer, if applicable;

(5) the date of the payoff statement;

(6) the amount necessary to payoff the account as of the stated date of the payoff statement. If the amount is subject to change after the stated date, the creditor must indicate that fact. The payoff statement may also include a description of the daily accrual of finance charges and known and identified subsequent events;

(7) a statement that specifies how and where to tender the payoff amount to the holder; and

(8) the last date upon which the payoff terms will be honored as specified by subsection (k) of this section.

(h) Delivery of payoff statement or statement of payments. The holder may give the payoff statement or statement of payments to the retail buyer or buyer's designee over the telephone or by mail, email, website address, or other means. If requested by the retail buyer or buyer's designee, the payoff statement or statement of payments must be given in writing. A payoff statement or statement of payments given by email or by website address from which the statement may be printed satisfies the writing requirement of this subsection.

(i) Cost of payoff statement or statement of payments. The retail buyer or buyer's designee is entitled to one written payoff statement or written statement of payments free of charge during a six-month period. The charge for each additional written payoff statement or written statement of payments may not exceed $1.00. A holder may not charge a fee for a payoff statement or statement of payments unless the holder gives the statement in writing.

(j) Reasonable time period. In the case of a motor vehicle retail installment sales contract made under Texas Finance Code, Chapter 348, a presumptively reasonable time in which to give a payoff statement or statement of payments is:

(1) for accounts in litigation, bankruptcy, or repossession status, five (5) calendar days, excluding legal public holidays as defined by 5 U.S.C. §6103; or

(2) for all other accounts not meeting the requirements of paragraph (1) of this subsection, two (2) business days.

(3) The reasonable time period in which to give the payoff statement or statement of payments does not begin to run unless the retail buyer or buyer's designee provides the holder the information necessary for the holder to determine the proper account and verify the requester's identity.

(4) The holder's response is timely if placed in first-class U.S. mail, given by facsimile or email, or otherwise transmitted within the reasonable time period.

(5) The reasonable time periods defined by this subsection are presumed to be reasonable and may only be rebutted by a showing of good cause.

(k) Payoff statement binding. Pursuant to Texas Finance Code, §348.408, a holder who gives the retail buyer or the buyer's designee outstanding balance information in a payoff statement is bound by that information and must honor that information for a reasonable time.

(1) If the holder gives the payoff statement to the retail buyer or buyer's designee by hand-delivery, facsimile, email, or website, a reasonable time is 10 calendar days from the date the payoff statement is given.

(2) If the holder gives the payoff statement to the retail buyer or buyer's designee by first-class mail, registered or certified mail, or any other delivery method not specified by paragraph (1) of this subsection, a reasonable time is 15 calendar days from the date the payoff statement is given.

§84.503. Collection Practices.

(a) In attempting to collect money due on a motor vehicle retail installment sales contract or to take possession of any property securing a motor vehicle installment sales contract, a licensee or the licensee's agent must not use any means other than appeals to reason or lawful remedies authorized under the laws of this state or other applicable law.

(b) A licensee or the licensee's agent must not use any physical force or violence against any person or use any violence or other force that results in harm or damage to property.

§84.504. Collection Contacts.

(a) A licensee or the licensee's agent has the right to contact any person in order to secure information concerning a retail buyer,

unless any person other than the retail buyer, the retail buyer's spouse, a member of the retail buyer's household, a co-buyer, endorser, surety, or guarantor of the obligation, objects to any contact by a licensee or the licensee's agent. Any objection must specify the retail buyer and the account in question to the licensee or the licensee's agent involved in the collection. Upon receipt of the objection, the licensee or agent must cease and desist from any further deliberate communication with the person objecting relative to the specific retail buyer and account in question.

(b) A licensee or the licensee's agent must not solicit the payment of all or any part of any debt subject to Texas Finance Code, Chapter 348 from any person other than the retail buyer, a co-buyer, endorser, surety, or guarantor of the obligation, retail buyer's designee, trustee, insurance company or service contract provider paying a claim or a refund involving the debtor or motor vehicle, any party having a lawful right or claim to the motor vehicle, any person who may be or is legally obligated to pay all or a portion of the debt, or a guardian, executor, administrator, attorney, agent, or representative of any of the foregoing.

(c) Without the prior written consent of the retail buyer given directly to the licensee or the express permission of a court of competent jurisdiction, a licensee may not communicate with a retail buyer in connection with the collection of amounts due under a motor vehicle retail installment sales contract at any unusual time. In the absence of any knowledge to the contrary, a licensee can assume that the convenient time for communicating with a retail buyer is after 8:00 a.m. and before 9:00 p.m., local time at the retail buyer's location.

(d) A licensee may not knowingly communicate with a retail buyer in connection with the collection of amounts due under a motor vehicle retail installment sales contract at the retail buyer's place of employment if the licensee has received written notification from the retail buyer or the retail buyer's employer to cease communications with the retail buyer while at the place of employment regarding the specific retail buyer and account in question. The licensee may require the retail buyer or retail buyer's employer to place the objection in writing. The objection, if required, should specify the name or names of retail buyers subject to the objection. The prohibition on contact under this subsection may be overridden by court order.

(e) Without the prior written consent of the retail buyer given directly to the licensee or the express permission of a court of competent jurisdiction, in connection with the collection of amounts due under a motor vehicle retail installment sales contract, a licensee may not communicate nonpublic personal information pertaining to a debt or obligation unless the person receiving the information is the retail buyer, the retail buyer's attorney, the retail buyer's designee, a co-buyer, endorser, surety, or guarantor of the obligation, a consumer reporting agency, another creditor, the attorney of the creditor, a guardian, executor, or administrator, or any party that may lawfully receive the information under the Gramm Leach Bliley Act, 15 U.S.C. §6801, *et seq.*, and its implementing regulations, or the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq.*, and its implementing regulations, or other law or regulation. Unless notified pursuant to subsection (a) of this section, this prohibition does not apply to a licensee seeking information about the location of the retail buyer.

(f) Subsections (a) - (e) of this section do not apply to a communication or contact directly relating to a pending court or arbitration proceeding. Subsections (a), (b), (d), and (e) of this section do not apply to providing a notice required by law or contract.

(g) In attempting to collect money due on a contract or to take possession of any property securing a motor vehicle retail installment sales contract, a licensee or the licensee's agent must not use any simulated legal process, simulated legal document, or legal form designed to suggest that legal proceedings have been commenced or completed when in fact they have not.

(h) In attempting to collect money due on a motor vehicle retail installment sales contract, to take possession of any property securing a motor vehicle retail installment sales contract, or to secure information concerning a motor vehicle retail installment sales contract, a licensee or the licensee's agent must not impersonate or attempt to impersonate any law enforcement officer or other agent of federal, state, or local governments. A licensee or a licensee's agent must not use any fictitious name unless the name used is an established or recognized trade name of the licensee or the licensee's agent. The preceding sentence does not apply to individual employees or representatives of the licensee, so long as the licensee maintains a system to determine the identity of the person contacting the obligor.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803211
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 936-7621

SUBCHAPTER G. EXAMINATIONS

7 TAC §§84.703 - 84.706

The Finance Commission of Texas (commission) adopts new §§84.703 - 84.706, concerning Examinations, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. The commission adopts §84.704 and §84.705 with changes and §84.703 and §84.706 without changes from the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3522).

The commission received no written comments on the proposal. The agency has, however, revised several provisions as a result of informal comments received. These revisions are summarized following the particular purpose of the rule to reflect changes made since the proposal.

The new rules contain new operational provisions regarding examination procedures. The purpose of the rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. The following paragraphs outline the individual purposes of each adopted rule.

Section 84.703 authorizes the commissioner to require a licensee to review records and make corrections, if an examination reveals that a licensee is engaging in a pattern or practice that appears to be a systemic violation of the law. The rule is necessary to ensure that transactions comply and that records are being maintained with the applicable law.

Section 84.704 provides the procedures for correcting violations of law or errors on accounts. The rule is necessary to provide a uniform procedure for curing violations of law and correcting en-

tries on accounts. The rule includes procedures for cash refunds and for refunds made by check, money order, or other negotiable instrument.

In response to informal comments received, §84.704 has experienced revisions to improve clarity and accuracy, including the addition of new subsections (f) and (g). The first clarification changes are found in subsection (a), where language has been added to accommodate accelerated balances or past due amounts. Thus, the first sentence of §84.704(a) now reads: "Any amount due a retail buyer because of a correction of an error or a violation may be credited to an amount due under the motor vehicle retail installment sales contract or to the next payment or payments on the existing account of the retail buyer." The corresponding introductory phrase "If the credit is applied to payments not yet due" has also been added to the second sentence of subsection (a).

In §84.704(b)(2), the third sentence now reads: "The licensee must also maintain sufficient information that could be used to determine whether the check, money order, or other negotiable instrument was successfully negotiated." This clarification in wording is intended to address the fact that most banks no longer return cancelled checks, but that the bank may be contacted to obtain information to trace the successful negotiation of a check.

In the second sentence of subsection (c) of §84.704, the phrase "give the retail buyer" has been replaced with "deduct from the precomputed balance." This revision clarifies how the credit of precomputed finance charge is applied. Also, calculation-related changes have been made to §84.704(e), resulting in the last phrase reading as follows: "the licensee must refund or credit to the account the amount due to the retail buyer for the error correction or adjustment in addition to the amount of accrued time price differential on the correction or adjustment amount."

Regarding the two new subsections, §84.704(f) has been added to provide flexibility for the multitude of unforeseen situations that may arise, so that the commissioner may make adjustments where the stated correction of errors or violations provisions would not be feasible. New subsection (g) provides that if a licensee corrects a violation in compliance with instructions on an examination report, that correction will satisfy the requirements of §84.704. Section 84.704(g) also requires that documentation be maintained for all corrections made under the section.

Section 84.705 details the procedures for handling unclaimed funds that are due to a retail buyer. The rule provides procedures that conform to Texas Property Code, Chapter 72.

Section 84.705 has been revised to address informal comments received. In subsection (b), the phrase "with respect to a specific retail buyer" has been added after "necessary" in the last sentence to provide clarification.

Subsections (c) and (d) of §84.705 have experienced revisions in order to reflect the possible applicability of laws outside of Texas. Thus, in subsection (c) after "in this state," the phrase "or other appropriate state or governmental entity if the address is not in this state" has been added. The corresponding phrase "or must be paid to the appropriate state or other governmental entity under the time period provided by the other state's or entity's applicable law" has been added to the end of subsection (d). Also, some additional changes in wording have been made to §84.705(c) and (d) to improve clarity and consistency, and to coordinate with the revisions outlined in this paragraph.

Section 84.706 provides for a fee in addition to the assessment fee that may be charged to licensees who require an expedited follow-up examination due to noncompliance issues. The rule is necessary to permit the agency to recover the direct and indirect costs associated with conducting follow-up examinations.

The new sections are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter. These rules affect Texas Finance Code, Chapter 348.

§84.704. Correction of Errors or Violations.

(a) Any amount due a retail buyer because of a correction of an error or a violation may be credited to an amount due under the motor vehicle retail installment sales contract or to the next payment or payments on the existing account of the retail buyer. If the credit is applied to payments not yet due, the licensee must notify the retail buyer in writing of the date and amount of the next payment due after this credit has been given.

(b) In lieu of crediting an existing account, a refund may be made directly to the retail buyer by cash, check, money order, or other negotiable instrument. The licensee must maintain sufficient records that the refund was made.

(1) Cash refunds. If the refund is made directly to the retail buyer in cash, the licensee must obtain a signed or authenticated acknowledgment from the retail buyer. The signed or authenticated acknowledgment must contain the following information:

(A) the retail buyer's full name;

(B) the retail buyer's account number (the account number upon which the refund was made);

(C) the amount of the refund; and

(D) a statement that the retail buyer received the refund in cash and that the licensee has not instructed or required the retail buyer to repay the cash refund.

(2) Refunds made by check, money order, or other negotiable instrument. If the refund is made directly to the retail buyer by check, money order, or other negotiable instrument, the licensee must, at a minimum, mail the refund to the last known address of the retail buyer by first-class mail. The licensee must maintain a complete paper or electronic copy of the check, money order, or other negotiable instrument. The licensee must also maintain sufficient information that could be used to determine whether the check, money order, or other negotiable instrument was successfully negotiated. If the check or money order is drawn from an account that is not under the licensee's control, sufficient information will include the name of the bank or company upon which the refund check or money order is drawn, the account number upon which the refund check or money order is drawn, the amount of the check or money order, check or money order number, and routing or tracking number of the check or money order.

(c) If the error correction or adjustment to an account is related to an improper charge or proceeds improperly held by the licensee on which time price differential has been precomputed (regular transaction using sum of the periodic balances method or scheduled installment earnings method), the licensee may alternatively credit the final maturing installment or installments of the contract. In addition to the error correction or adjustment, a licensee must also deduct from the precomputed balance the proportionate amount of time price differential originally charged on the amount being credited.

(d) If the licensee applies the refund to an existing account of the licensee, the licensee may be required to refund the amount due a retail buyer plus the amount of accrued time price differential on the correction or adjustment amount or a proportionate amount of time price differential originally charged on the amount being credited. If more than half of the precomputed time balance (regular transaction using the sum of the periodic balances method or scheduled installment earnings method) has been paid before applying the credit to the account, the licensee may be required to refund the proportionate amount of time price differential originally charged on the amount being credited.

(e) If the error correction or adjustment is made to an account where the time price differential charge is earned using the true daily earnings method, the licensee must refund or credit to the account the amount due to the retail buyer for the error correction or adjustment in addition to the amount of accrued time price differential on the correction or adjustment amount.

(f) The commissioner may make adjustments or exceptions to the requirements under this section for unusual situations or when necessary to achieve an appropriate, practical, and workable result.

(g) If the licensee corrects a violation of law in compliance with any instructions on any examination report, that correction will satisfy the requirements of this section with respect to the violation being corrected. Documentation must be maintained regarding all corrections made under this section.

§84.705. Unclaimed Funds.

(a) Escheat suspense account. The licensee must transfer any amounts due a retail buyer not paid within one year (i.e., unclaimed funds) to an escheat suspense account. The transfer must be noted on the account record of the retail buyer.

(b) Required information. Evidence of a bona fide attempt to pay a refund to a retail buyer must be kept in the records of the retail buyer. The licensee must place with the records of the retail buyer any information received by the licensee that indicates the retail buyer has died leaving no will or heirs or has left the community and the retail buyer's whereabouts are unknown. If deemed necessary with respect to a specific retail buyer, a licensee may be required to send the unclaimed funds by registered or certified mail to the last known address of the retail buyer.

(c) Use of unclaimed funds. Use of unclaimed funds within the business is not prohibited until such time as paid to the retail buyer, to the estate of the retail buyer, to the State of Texas if the last known address of the retail buyer as shown on the records of the holder is in this state, or other appropriate state or governmental entity if the address is not in this state; however, funds transferred to an escheat suspense account must not be commingled with the funds of the business.

(d) Escheat to state. At the end of three (3) years, the unclaimed funds must be paid to the State of Texas Comptroller of Public Accounts, Treasury Division, as required by Texas Property Code, §72.101, or must be paid to the appropriate state or other governmental entity under the time period provided by the other state's or entity's applicable law.

(e) Record retention. The records of the escheat suspense account must be retained for a period of 10 years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803214

Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 936-7621

SUBCHAPTER H. RETAIL INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §84.808

The Finance Commission of Texas (commission) adopts new §84.808, concerning Retail Installment Sales Contract Provisions, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. The commission adopts §84.808 with changes from the proposal published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3524).

The commission received no written comments on the proposal.

Section 84.808 is being relocated and reorganized. The agency believes that the reorganization will benefit licensees in that these rules will be easier to find in a more logical location and order which better tracks the organization of Texas Finance Code, Chapter 348. The relocated rule is substantially similar to the rule being repealed, as found in 7 TAC §84.209, concerning Model Clauses. The commission's adopted repeal of this section is published elsewhere in this issue of the *Texas Register*.

Concerning new (relocated) §84.808, the rule (along with recently relocated §§84.801 - 84.807 and §84.809) implements the provisions of Texas Finance Code, §341.502, which require contracts under Chapter 342 or 348, whether in English or in Spanish, to be written in plain language. Use of the model clauses is optional; however, should a licensee choose not to use the model clauses, or a contract comprised of model clauses, then the licensee's non-standard contract must be submitted to the agency in accordance with the provisions of 7 TAC §84.802.

The purpose of this relocated rule tracks the original purpose language used when the rule was originally adopted. Please note that, aside from changes to section number references, the new rule in §84.808 is being relocated with one citation correction.

The following paragraph outlines the purpose of the adopted rule. The relocated rule is listed with its former location "(former §84.XXX)" listed after the new section number.

Section 84.808 (former §84.209) contains the model clauses. These clauses are the administrative interpretation of a plain language version of typical contract provisions. Some model clauses are required by state and federal statutes and regulations depending on the circumstances of a particular transaction. Established model contract provisions encourage uniformity and provide benefits to consumers by making contracts easier to understand. A creditor is not limited to the contract provisions contained in these rules and retains flexibility to design contract forms suitable for the creditor's use. These multi-purpose contract provisions are intended for use by franchised dealers, independent dealers, holders of motor vehicle retail installment sales contracts, and individuals who sell less than five motor vehicles per year.

Since the proposal, §84.808 has experienced one technical correction. In §84.808(19) regarding the Consumer Credit Commissioner notice, the citation has been corrected by replacing former "§1.901" with current "§86.101."

The new section is adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter. This rule affects Texas Finance Code, Chapter 348.

§84.808. Model Clauses.

The following model clauses provide the plain language equivalent of provisions found in contracts subject to Texas Finance Code, Chapter 348.

(1) Identification of parties. This information identifies the parties to the contract.

(A) The model identification clause lists the name and address of the creditor, the date of the contract, and the name and address of the buyer. At the creditor's option, a creditor may include an account number or contract number. The model clause reads:
Figure: 7 TAC §84.808(1)(A)

(B) The Buyer is referred to as "I" or "me." The Seller is referred to as "you" or "your."

(2) Assignment of contract. The model clause regarding assignment of contract reads: "This contract may be transferred by the Seller."

(3) Buyer's affirmation and promise to pay. The model clause regarding buyer's affirmation and promise to pay reads: "The credit price is shown below as the "Total Sales Price." The "Cash Price" is also shown below. By signing this contract, I choose to purchase the motor vehicle on credit according to the terms of this contract. I agree to pay you the Amount Financed, Finance Charge, and any other charges in this contract. I agree to make payments according to the Payment Schedule in this contract. If more than one person signs as a buyer, I agree to keep all the promises in this agreement even if the others do not."

(4) Inspection acknowledgment. The model clause regarding inspection acknowledgment reads: "I have thoroughly inspected, accepted, and approved the motor vehicle in all respects."

(5) Identification of motor vehicle. The motor vehicle identification information provision should contain the following information about the motor vehicle: the seller's stock number; the manufacturer's year model; the manufacturer's make; the manufacturer's model type or number; the vehicle identification number; the license plate number (if applicable); a new/used designation; and the primary purpose designation. The seller's stock number and the license number are both optional; the omission will not make a contract non-standard. The motor vehicle identification information provision may include additional information about the vehicle including, odometer reading, color, the designation as a heavy commercial vehicle, and key code. If the creditor includes this additional information about the motor vehicle, the change will not make the provision a non-standard provision. The model clause regarding identification of the motor vehicle reads:
Figure: 7 TAC §84.808(5)

(6) Trade-in vehicle description. The model clause regarding trade-in vehicle description reads:
Figure: 7 TAC §84.808(6)

(7) Truth in Lending Act disclosure. The model clause regarding Truth in Lending Act disclosure reads:
Figure: 7 TAC §84.808(7)

(8) Itemization of amount financed. The creditor drafting the contract is given considerable flexibility regarding the itemization of amount financed disclosure so long as the itemization of amount financed disclosure complies with the Truth in Lending Act. As an example, a creditor may disclose the manufacturer's rebate either as: a component of the downpayment; or a deduction from the cash price of the motor vehicle. The model contract provision for the itemization of the amount financed discloses the manufacturer's rebate as a component of the downpayment. If the creditor elected to disclose the manufacturer's rebate as a deduction from the cash price of the motor vehicle, the cash price component of the itemization of amount financed would be amended to reflect the dollar amount of the manufacturer's rebate being deducted from the cash price of the motor vehicle.

(A) The model clause regarding itemization of amount financed-sales tax advance reads:
Figure: 7 TAC §84.808(8)(A)

(B) The model clause regarding itemization of amount financed-sales tax deferred reads:
Figure: 7 TAC §84.808(8)(B)

(C) Plate transfer fee. Under Texas Transportation Code, §502.453, the creditor may charge under the itemization of amount financed a $5.00 fee for transferring license plates and receiving new registration insignia. The creditor may document the plate transfer fee in the Other Charges section with the following language: "to State for Plate Transfer Fee."

(D) Compliance fee prohibited. Under Texas Transportation Code, §503.0631(f), the creditor is prohibited from assessing an itemized charge under the itemization of amount financed for costs associated with complying with the temporary tag database.

(9) Documentary fee.

(A) The following notice satisfies the requirements of Texas Finance Code, §348.006 if printed in a size equal to at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous and within reasonable proximity to the place at which the fee is disclosed. The parenthetical phrase may be inserted at the dealer's option or the disclosure may be made without the parenthetical phrase if the dealer does not charge an amount in excess of $50 for either ordinary motor vehicles or heavy commercial vehicles or if the contract form is not used for heavy commercial vehicles. The model clause is contained in the Itemization of Amount Financed. The documentary fee clause reads: "A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50 (for a motor vehicle contract or a reasonable amount agreed to by the parties for a heavy commercial vehicle contract). This notice is required by law."

(B) The following notice is a sufficient Spanish translation of the documentary fee disclosure required by Texas Finance Code, §348.006. The parenthetical phrase may be inserted at the dealer's option or the disclosure may be made without the parenthetical phrase if the dealer does not charge an amount in excess of $50 for either ordinary motor vehicles or heavy commercial vehicles or if the contract form is not used for heavy commercial vehicles. The Spanish translation may read: "Un honorario de documentación no es un honorario oficial. Un honorario de documentación no es requerido por la ley, pero puede ser cargada al comprador como gastos de manejo de documen-

tos y para realizar servicios relacionados con el cierre de una venta. Un honorario de documentación no puede exceder $50 (un contrato de vehículo automotor o una cantidad razonable acordada por las partes para un contrato de vehículo comercial pesado). Esta notificación es requerida por la ley." Or "Un cargo documental no es un cargo oficial. La ley no exige que se imponga un cargo documental. Pero èste podría cobrarse a los compradores por el manejo de la documentación y la prestación de servicios en relación con el cierre de una venta. Un cargo documental no puede exceder de $50 para (un contrato de vehículo automotor o una cantidad razonable acordada por las partes para un contrato de vehículo comercial pesado). Esta notificación se exige por ley."

(10) Deferred downpayments. The creditor has considerable flexibility in disclosing the deferred downpayments. The model provision discloses the deferred downpayments by placing the information, the due date and dollar amount of the deferred downpayments, in several boxes. If a creditor uses this model provision, the creditor would enter the due date and dollar amount of each deferred downpayment in the appropriate boxes. As an alternative to this model provision, a creditor may disclose the deferred downpayments in the Payment Schedule of the Amount Financed in the federal disclosure box. If a creditor elects this option, the due date and the dollar amount of the deferred downpayment must be shown. If the total amount of the deferred downpayment is not satisfied by the date of the second regularly scheduled installment, the deferred downpayment must be included in the Payment Schedule. As another alternative, the creditor may disclose the deferred downpayment amount in the Payment Schedule. The model clause regarding deferred downpayments reads:
Figure: 7 TAC §84.808(10)

(11) Required physical damage insurance. The creditor may chose to omit the statement of the retail buyer's right to obtain substitute coverage from another source. The model clause regarding required physical damage insurance reads:
Figure: 7 TAC §84.808(11)

(12) Optional insurance coverages. The model clause regarding optional insurance coverages reads:
Figure: 7 TAC §84.808(12)

(13) Optional credit life and accident and health insurance. The model clause regarding optional credit life and accident and health insurance reads:
Figure: 7 TAC §84.808(13)

(14) Liability insurance. If liability insurance coverage is not included in the contract, any of the following notices are sufficient to satisfy the requirements of Texas Finance Code, §348.205 if printed in a size equal to at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous:

(A) "THIS CONTRACT DOES NOT INCLUDE INSURANCE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS."

(B) "UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS CONTRACT."

(C) "UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, ANY INSURANCE REFERRED TO IN THIS CONTRACT DOES NOT INCLUDE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS."

(15) Prohibition against oral modifications. The contract may include a provision barring oral modifications of the contract. A unilateral change to a contract may nevertheless occur as prescribed by the procedures in Texas Finance Code, Chapter 349, Subchapter C. The model clause regarding prohibition against oral modifications reads:
Figure: 7 TAC §84.808(15)

(16) Finance charge earnings methods:

(A) Regular transaction using sum of the periodic balances method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the add-on method as defined by the Texas Finance Commission Rule. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract." Or

(II) "The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00."

(ii) Deferred sales tax. The model clause regarding deferred sales tax reads: "The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance subject to a finance charge and added as a lump sum to the unpaid principal balance subject to a Finance Charge for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00."

(B) True daily earnings method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the true daily earnings method as defined by the Texas Finance Code. Under the true daily earnings method, the Finance Charge will be figured by applying the daily rate to the unpaid portion of the Amount Financed for the number of days the unpaid portion of the Amount Financed is outstanding. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or returned check charges." Or

(II) If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is not deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. The daily rate is 1/365th of the contract rate. The unpaid principal balance does not include the late charges or returned check charges."

(ii) Deferred sales tax: If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. The daily rate is 1/365th of the contract rate. The un-

paid principal balance subject to a finance charge does not include the late charges, sales tax, or returned check charges."

(C) Scheduled installment earnings method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the scheduled installment earnings method as defined by the Texas Finance Code. Under the scheduled installment earnings method, the Finance Charge is figured by applying the daily rate to the unpaid portion of the Amount Financed as if each payment will be made on its scheduled payment date. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or returned check charges." Or

(II) If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is not deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance does not include the late charges or returned check charges."

(ii) Deferred sales tax. If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You figured the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance subject to a Finance Charge does not include the late charges, sales tax, or returned check charges."

(17) Consumer warning. The following notices satisfy the requirements of Texas Finance Code §348.102(d) if printed in at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous.

(A) For contracts using the sum of the periodic balances method (Rule of 78s) or the scheduled installment earnings method, the notice may read:

(i) "NOTICE TO THE BUYER--I WILL NOT SIGN THIS CONTRACT BEFORE I READ IT OR IF IT CONTAINS ANY BLANK SPACES. I AM ENTITLED TO A COPY OF THE CONTRACT I SIGN. UNDER THE LAW, I HAVE THE RIGHT TO PAY OFF IN ADVANCE ALL THAT I OWE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE. I WILL KEEP THIS CONTRACT TO PROTECT MY LEGAL RIGHTS." Or

(ii) "NOTICE TO THE BUYER--THE BUYER SHOULD NOT SIGN THIS CONTRACT BEFORE READING IT OR IF IT CONTAINS ANY BLANK SPACES. THE BUYER IS ENTITLED TO A COPY OF THE SIGNED CONTRACT. UNDER THE LAW, THE BUYER HAS THE RIGHT TO PAY OFF IN ADVANCE ALL THAT THE BUYER OWES AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE. THE BUYER SHOULD KEEP THIS CONTRACT TO PROTECT ITS LEGAL RIGHTS."

(B) For contracts using the true daily earnings method, the notice may read: "NOTICE TO THE BUYER--I WILL NOT SIGN THIS CONTRACT BEFORE I READ IT OR IF IT CONTAINS ANY BLANK SPACES. I AM ENTITLED TO A COPY OF THE CONTRACT I SIGN. UNDER THE LAW, I HAVE THE RIGHT TO PAY OFF IN ADVANCE ALL THAT I OWE AND UNDER CERTAIN CONDITIONS MAY SAVE A PORTION OF THE FINANCE CHARGE. I WILL KEEP THIS CONTRACT TO PROTECT MY LEGAL RIGHTS."

(18) Buyer's acknowledgment of contract receipt.

(A) The following acknowledgments conform to the requirements of Texas Finance Code, §348.112 if they appear directly above the place for the buyer's signature in at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous. A creditor may choose the most appropriate option:

(i) If the buyer's signature is dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. A reasonable period of time would ordinarily be three days, excluding Sundays and holidays. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT. WHEN I SIGN THE CONTRACT, I WILL RECEIVE THE COMPLETED CONTRACT. IF NOT, I UNDERSTAND THAT A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME."

(ii) If the buyer's signature is not dated. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT. I RECEIVED THE COMPLETED CONTRACT ON _____ (MO.) (DAY) (YR.)."

(iii) If the buyer's signature is not dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. The model acknowledgment may read: "I SIGNED THIS CONTRACT ON _____ AND A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME."

(iv) If the buyer's signature is not dated but the contract contains the date of the transaction. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT AND ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF IT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT."

(B) Acceptance of contract receipt. The model clause regarding acceptance of contract receipt reads:
Figure: 7 TAC §84.808(18)(B)

(19) Consumer Credit Commissioner notice. The following notice satisfies the requirements of Texas Finance Code, §14.104 and §86.101 of this title (relating to Consumer Notifications). The telephone number of the retail seller, creditor, or holder may be printed in conjunction with the name and address of the retail seller, creditor, or holder elsewhere on the contract or agreement provided the notice required by Texas Finance Code, §14.104 is amended to direct the reader's attention to the area of the contract where the telephone number may be found. The consumer credit commissioner notice reads: "To contact (insert authorized business name of retail seller, creditor or holder as appropriate) about this account, call (insert telephone number of retail seller, creditor, or holder as appropriate). This contract is subject in whole or in part to Texas law which is enforced by the Consumer Credit Commissioner, 2601 N. Lamar Blvd., Austin, Texas

78705-4207; (800) 538-1579; www.occc.state.tx.us, and can be contacted relative to any inquiries or complaints."

(20) Finance charge refund method. If a contract uses the finance charge refunding method of the sum of the periodic balances or the scheduled installment earnings method, the finance charge refund provision reads: "If I prepay in full, I may be entitled to a refund of part of the Finance Charge." On contracts using the true daily earnings method, this finance charge refund provision should not be disclosed because it is not applicable.

(A) Contracts using the sum of the periodic balances method.

(i) Name of method. The model clause to identify the method of refunding finance charge reads: "You will figure the Finance Charge refund by using the sum of the periodic balances method as defined by the Texas Finance Commission rule."

(ii) Optional description of method. The creditor may include the following additional description of the method. The model clause reads: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge Refund will be computed upon the entire Finance Charge minus the Acquisition Cost. I will not get a refund if it is less than $1.00."

(iii) Optional description of method for use in contracts for heavy commercial vehicles. At the creditor's option, a contract for a heavy commercial vehicle, as defined in the Texas Finance Code, may include the following description of the method. The model clause reads: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge refund will be computed based upon the entire Finance Charge calculated using the sum of the periodic balances method. Then you will subtract the Acquisition Cost from that amount. I will not get a refund if it is less than $1.00."

(B) Contracts using the scheduled installment earnings method.

(i) Name of method. The model clause to identify the method of refunding finance charge reads: "You will figure the Finance Charge refund by the scheduled installment earnings method as defined by the Texas Finance Commission rule."

(ii) Optional description of method. The creditor may include the following additional description of the method: "You will figure my refund by deducting earned finance charges from the Finance Charge. You will figure earned finance charges by applying a daily rate to the unpaid principal balance as if I paid all my payments on the date due. If I prepay between payment due dates, you will figure earned finance charges for the partial payment period. You do this by counting the number of days from the due date of the prior payment through the date I prepay. You then multiply that number of days times the daily rate. The daily rate is 1/365th of the Annual Percentage Rate. You will also add the acquisition cost of $25 (or $150 for a heavy commercial vehicle) to the earned finance charge. I will not get a refund if it is less than $1.00."

(C) Flexible contract forms designed to accommodate alternative methods. Creditors may use a flexible contract form with alternative earnings methods, so long as the method used on a particular contract is permissible for that contract. The following clause illustrates one way that this flexibility may be accomplished: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule if: this contract is a Regular Payment Contract as defined by the Texas Finance Commission rule, and this contract does not have a term greater than 61 months. If this contract is not a Regular Payment Contract or if it has a term greater than 61 months, you will figure the Finance Charge refund using the scheduled installment earnings method as defined by the Texas Finance Commission rule. I will not get a refund if it is less than $1.00."

(21) Application of payments. In this provision, the term "finance charge" should not be construed to have the same meaning as Finance Charge as defined by the Truth in Lending Act. A default or late charge is considered to be a finance charge under Texas law; therefore, a default or late charge can be charged and collected as part of the earned finance charge. At the creditor's option the creditor may modify the application of payments language by adding "and late charges" following the phrase "earned but unpaid finance charge." The model clause reads:
Figure: 7 TAC §84.808(21)

(22) Effect of early and late payments. For contracts using the true daily earnings method, the model clause reads: "You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. If I do not timely make all my payments in at least the correct amount, I will have to pay more Finance Charge and my last payment will be more than my final scheduled payment. If I make scheduled payments early, my Finance Charge will be reduced (less). If I make my scheduled payments late, my Finance Charge will increase."

(23) Interest on matured amount. The model provision for interest on any matured amount at any rate permitted by law reads: "If I don't pay all I owe when the final payment becomes due, or I do not pay all I owe if you demand payment in full under this contract, I will pay an interest charge on the amount that is still unpaid. That interest charge will be the higher rate of 18% per year or the maximum rate allowed by law, if that rate is higher. The interest charge for this amount will begin the day after the final payment becomes due." In this provision, the maximum rate allowed by law refers to the rate found in Texas Finance Code, Chapter 303.

(24) Balloon payments. If the contract has a balloon payment, the creditor must include a provision in the contract that allows the buyer to refinance the balloon payment over time. The provision must comply with Texas Finance Code, §348.123. The model provision for defining the balloon payment reads: "A balloon payment is a scheduled payment more than twice the amount of the average of my scheduled payments, other than the downpayment, that are due before the balloon payment."

(A) Paying the balloon payment. If a retail installment contract contains a balloon payment that is the final payment, the contract must also provide the right for the retail buyer to pay the balloon payment. The model provision for paying the amount of the final scheduled balloon payment reads: "I can pay all I owe when the balloon payment is due and keep my motor vehicle."

(B) Balloon payment alternatives. If the retail installment contract contains the right for a retail buyer to refinance a balloon installment, the contract provision to refinance the installment must comply with either clause (i) or (ii) of this subparagraph. A contract under clause (ii) of this subparagraph must also contain the right of the retail buyer to sell the motor vehicle back to the holder or the retail seller.

(i) The model clause to describe a buyer's right to refinance a balloon installment under Texas Finance Code, §348.123(a), when applicable reads: "If I buy the motor vehicle primarily for personal, family, or household use, I can enter into a new written agreement to refinance the balloon payment when due without a refinancing fee. If I refinance the balloon payment, my periodic payments will not

be larger or more often than the payments in this contract. The annual percentage rate in the new agreement will not be more than the Annual Percentage Rate in this contract. This provision does not apply if my Payment Schedule has been adjusted to my seasonal or irregular income."

(ii) If the contract contains a balloon payment and the seller intends Texas Finance Code, §348.123(b)(5) to apply to the contract:

(I) Special right to refinance balloon payment under Texas Finance Code, §348.123(b)(5)(B)(iii). The model clause reads: "I can enter into a new agreement to refinance my last installment if I am not in default. I can refinance at an annual percentage rate up to 5 points greater than the Annual Percentage Rate shown in this contract. The rate will not be more than applicable law allows. The new agreement will allow me to refinance the last installment for at least 24 months with equal monthly payments. You and I can also agree to refinance the last installment over another time period or on a different payment schedule."

(II) Repurchase option. If the contract includes a balloon payment, the creditor must draft a provision addressing the repurchase option.

(25) Agreement to keep motor vehicle insured. The model clause regarding agreement to keep the motor vehicle insured reads: "I agree to have physical damage insurance covering loss or damage to the motor vehicle for the term of this contract. The insurance must cover your interest in the vehicle." The creditor may include the following optional provision: "The insurance must include collision coverage and either comprehensive or fire, theft, and combined additional coverage."

(26) Creditor's right to purchase required insurance if buyer fails to keep motor vehicle insured. The model clause regarding agreement to allow the creditor to purchase required insurance if the buyer fails to keep the motor vehicle insured reads: "If I fail to give you proof that I have insurance, you may buy physical damage insurance. You may buy insurance that covers my interest and your interest in the motor vehicle, or you may buy insurance that covers your interest only. I will pay the premium for the insurance and a finance charge at the contract rate. If you obtain collateral protection insurance, you will mail notice to my last known address shown in your file."

(27) Physical damage insurance proceeds. The model clause regarding physical damage insurance proceeds reads: "I must use physical damage insurance proceeds to repair the motor vehicle, unless you agree otherwise in writing. However, if the motor vehicle is a total loss, I must use the insurance proceeds to pay what I owe you. I agree that you can use any proceeds from insurance to repair the motor vehicle, or you may reduce what I owe under this contract. If you apply insurance proceeds to the amount I owe, they will be applied to my payments in the reverse order of when they are due. If my insurance on the motor vehicle or credit insurance doesn't pay all I owe, I must pay what is still owed. Once all amounts owed under this contract are paid, any remaining proceeds will be paid to me."

(28) Returned insurance premiums and service contract charges. The contract may authorize a creditor to apply charges returned to the creditor for canceled insurance, service contract, and extended warranty charges to the buyer's obligation under the agreement as permitted by law, regardless of whether or not the buyer is in default under the contract.

(A) The model clause for contracts using the true daily earnings method reads: "If you get a refund on insurance or service contracts, or other contracts included in the cash price, you will subtract it from what I owe. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me."

(B) For contracts using the scheduled installment earnings or sum of the periodic balances methods, the creditor may substitute the following clause: "If you get a refund of insurance or service contract charges, you will apply it and the unearned finance charges on it in the reverse order of the payments to as many of my payments as it will cover. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me."

(29) Application of credits. The model clause regarding application of credits reads: "Any credit that reduces my debt will apply to my payments in the reverse order of when they are due, unless you decide to apply it to another part of my debt. The amount of the credit and all finance charge or interest on the credit will be applied to my payments in the reverse order of my payments."

(30) Transfer of rights. The seller does not have a duty to disclose the terms on which a contract or a balance under a contract is acquired, including any discount or difference between the rates, charges, or balance under the contract and the rates, charges, or balance acquired as provided by Texas Finance Code, §348.301. The model clause regarding transfer of rights reads: "You may transfer this contract to another person. That person will then have all your rights, privileges, and remedies."

(31) Grant of security interest in collateral. The model clause regarding a description of a security interest granted in a typical motor vehicle installment sale reads:
Figure: 7 TAC §84.808(31)

(32) Agreements regarding use and transfer of motor vehicle. The contract may contain a provision prohibiting a buyer from transferring any interest in the motor vehicle without the creditor's written permission, requiring the buyer to notify the seller of change of address, or prohibiting the removal of the motor vehicle from Texas. The transfer fee limitation establishes the maximum fee that a creditor could contract for, charge, or collect for transferring the buyer's equity in the motor vehicle to another party. If desired, a creditor may amend the model provision to reflect a lower transfer fee amount. The model clause concerning agreements regarding the use and transfer of the motor vehicle reads: "I will not sell or transfer the motor vehicle without your written permission. If I do sell or transfer the motor vehicle, this will not release me from my obligations under this contract, and you may charge me a transfer of equity fee of $25 ($50 for a heavy commercial vehicle). I will promptly tell you in writing if I change my address or the address where I keep the motor vehicle. I will not remove the motor vehicle (Optional: motor vehicle or other collateral) from Texas for more than 30 days unless I first get your written permission."

(33) Care of motor vehicle. The contract may obligate the buyer to keep the motor vehicle free of liens and encumbrances, require the buyer to keep the motor vehicle in good working order and repair, or prohibit the buyer from allowing the motor vehicle to be exposed to seizure, confiscation, or other involuntary transfer. The model clause regarding care of the motor vehicle reads: "I agree to keep the motor vehicle free from all liens and claims except those that secure this contract. I will timely pay all taxes, fines, or charges pertaining to the motor vehicle. I will keep the motor vehicle in good repair. I will not allow the motor vehicle to be seized or placed in jeopardy, or use it illegally. I must pay all I owe even if the motor vehicle is lost, damaged or destroyed. If a third party takes a lien or claim against or possession of the motor vehicle, you may pay the third party any cost required to free the motor vehicle from all liens or claims. You may immediately demand that I pay you the amount paid to the third party for the motor vehicle. If I do not pay this amount, you may repossess

the motor vehicle and add that amount to the amount I owe. If you do not repossess the motor vehicle, you may still demand that I pay you, but you cannot compute a finance charge on this amount."

(34) Default rights and repossession provisions. This paragraph details agreements allowing acceleration of the buyer's obligation upon the buyer's default or upon the creditor's determination of insecurity as permitted by Texas Business and Commerce Code, §1.309. The following provisions are samples of model clauses regarding some of the default rights and remedies of a creditor in a typical motor vehicle installment sale transaction:

(A) Acceleration and default. The model clause regarding acceleration and default reads:
Figure: 7 TAC §84.808(34)(A)

(B) Late charge. The model clause regarding late charge reads: "I will pay you a late charge as agreed to in this contract when it accrues."

(C) Repossession. At the creditor's option, a creditor may choose one of the following model provisions pertaining to repossession. The model clauses regarding repossession read:

(i) "If I default, you may repossess the motor vehicle from me if you do so peacefully. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle." In this provision, the term "peacefully" is intended to have the same meaning as "without breaching the peace," as determined by the Texas courts, and as found under clause (ii) of this subparagraph. Or

(ii) "If I default, you may repossess the motor vehicle from me if you do so without breaching the peace. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle."

(D) Buyer's right to redeem. The model clause regarding buyer's right to redeem reads: "If you take my motor vehicle, you will tell me how much I have to pay to get it back. If I do not pay you to get the motor vehicle back, you can sell it or take other action allowed by law. My right to redeem ends when the motor vehicle is sold or you have entered into a contract for sale or accepted the collateral as full or partial satisfaction of a contract."

(E) Disposition of motor vehicle. The model clause regarding disposition of the motor vehicle reads: "If I don't pay you to get the motor vehicle back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. You can use the money you get from selling it to pay allowed expenses and to reduce the amount I owe. Allowed expenses are expenses you pay as a direct result of taking the motor vehicle, holding it, preparing it for sale, and selling it. If any money is left, you will pay it to me unless you must pay it to someone else. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest. If you take or sell the motor vehicle, I will give you the certificate of title and any other document required by state law to record transfer of title."

(F) Collection costs. The model clause regarding collection costs reads: "If you hire an attorney who is not your employee to enforce this contract, I will pay reasonable attorney's fees and court costs as the applicable law allows."

(G) Cancellation of optional insurance or service contracts. The model clause regarding cancellation of optional insurance or service contracts reads: "This contract may contain charges for insurance or service contracts or for services included in the cash price. If I default, I agree that you can claim benefits under these contracts to the extent allowable, and terminate them to obtain refunds of unearned charges to reduce what I owe or repair the motor vehicle."

(35) Acceleration, waiver of notice of intent to accelerate, and notice of acceleration. A model clause regarding the holder's right to accelerate maturity of the contract and to waive the buyer's or co-buyer's common law right to notice of intent to accelerate, notice of acceleration, or both reads: "If I default, or you believe in good faith that I am not going to keep any of my promises, you can demand that I immediately pay all that I owe. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe."

(36) Refund upon acceleration. For contracts using the sum of the periodic balances or scheduled installment earnings methods, the model clause regarding the buyer's right to a finance charge refund upon acceleration of the contract reads: "If you demand that I pay you all that I owe, you will give me a credit of part of the Finance Charge as if I had prepaid in full."

(37) Integration and severability.

(A) The contract may include an integration clause indicating that the parties to the contract intend it to be the final written expression of their agreement. The model clause regarding integration reads: "This contract contains the entire agreement between you and me relating to the sale and financing of the motor vehicle."

(B) The contract may also include a severability clause providing that the invalidity of any portion of the contract does not render invalid other parts of the contract that would otherwise be valid. The model clause regarding severability reads: "If any part of this contract is not valid, all other parts stay valid."

(38) No waiver and limitations on creditor's rights and usury savings.

(A) A model clause to prevent a creditor's delay in enforcing rights under the contract from affecting a waiver of those rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(B) A provision establishing limitations on the creditor's rights reads: "You will exercise all of your rights in a lawful way."

(C) The model clause regarding usury savings reads: "I don't have to pay finance charge or other amounts that are more than the law allows. This provision prevails over all other parts of this contract and over all your other acts."

(39) Applicable law. A model clause to establish the law that will apply to the contract reads: "Federal law and Texas law apply to this contract."

(40) Warranty disclaimer. The disclaimer of express and implied warranties should be set out from the surrounding text so that the disclosure is conspicuous. A disclaimer of express and implied warranties, such as the following, is permitted by Texas Business and Commerce Code, Article 2, Subchapter C, and reads: "Unless the seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the seller makes no warranties, express or implied, on the motor vehicle, and there will be no implied

warranties of merchantability or of fitness for a particular purpose. This provision does not affect any warranties covering the motor vehicle that the motor vehicle manufacturer may provide."

(41) Preservation of consumer's claims and defenses notice. This notice only applies if the motor vehicle financed in the contract was purchased for personal, family, or household use. The preservation of consumer's claims and defenses notice disclosure should be set out from the surrounding text so that the disclosure is in all capitals, boldfaced and in at least 10-point type. The preservation of consumer's claims and defenses notice disclosure, as required by the Federal Trade Commission's preservation of consumer's claims and defenses notice, 16 C.F.R. §§433.1 *et seq.*, reads: "NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. This provision applies to this contract only if the motor vehicle financed in the contract was purchased for personal, family, or household use."

(42) Used car buyer's guide. The used car buyer's guide disclosure should be set out from the surrounding text so that the disclosure is conspicuous. The disclosure should be prefaced by the words "In this box only, the word "you" refers to the Buyer." The used car buyer's guide disclosure, as required by the Federal Trade Commission's Used Car Regulation, 16 C.F.R. §§455.1 *et seq.*, reads:

(A) "Used Car Buyer's Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale."

(B) Spanish Translation: "Guía para compradors de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta."

(43) Negotiability and assignment. The disclosure of the negotiability of the contract should be placed on the front side of the contract and may read:

(A) "The Annual Percentage Rate may be negotiated with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge";

(B) "The rates of this contract are negotiable. The seller may assign or otherwise sell this contract and receive a discount or other payment for the difference between the rate, charges, or balance"; or

(C) "A customer may obtain their own financing. The finance charge may be negotiable. The dealership may assign the retail installment contract. There is no duty to disclose the terms for the sale of this contract (e.g., price paid to retail seller to purchase retail installment contract)."

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803217

Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: July 10, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER C. MEMBERS

7 TAC §91.301

The Credit Union Commission adopts amendments to §91.301, concerning Field of Membership, without changes to the text as published in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1477). The amendments to §91.301 add a new subsection granting the commissioner the authority to approve field of membership expansions that have been approved by the National Credit Union Administration. A second new subsection formalizes the criteria needed to add a Group to a credit union's field of membership. In addition, the amendments clarify that credit unions have the option to include businesses and other organizations whose employees are within the Group in its field of membership, unlike other entities that must receive separate expansion approval. Finally, the amendments eliminate some redundant overlap language and make grammatical and technical corrections to the rule.

The amendments are adopted as a result of the Department's general rule review.

The Commission received no comments with respect to these rule amendments. A public hearing on the amendments was held at the Department offices on May 2, 2008 at 9:00 a.m. No comments were received at that hearing.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.051, concerning membership.

The specific section affected by the amended rule is Texas Finance Code, §122.051.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803243
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 13, 2008
Proposal publication date: February 22, 2008
For further information, please call: (512) 837-9236

♦ ♦ ♦

7 TAC §91.302

The Credit Union Commission adopts amendments to §91.302, concerning Election or Other Vote By Electronic Device, Absentee Ballot, or Mail Ballot, without changes to the text as published in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1479). The amendments to §91.302 change the title of the section to Election or Other Membership Vote By Electronic Balloting, Early Voting, Absentee Voting, or Mail Balloting. The amendments also include provisions on early voting and encourage credit unions to promote member participation in elections and other membership votes. Additional amendments provide that early or absentee ballots must be received prior to the beginning of the meeting, eliminating the five calendar day requirement, and make grammatical and technical amendments.

The amendments are adopted as a result of the Department's general rule review.

The Commission received no comments with respect to these rule amendments. A public hearing on the amendments was held at the Department offices on May 2, 2008 at 9:00 a.m. No comments were received at that hearing.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.052, which directs the commission to establish rules for conducting mail and electronic balloting.

The specific section affected by the amended rule is Texas Finance Code, §122.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803244
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 13, 2008
Proposal publication date: February 22, 2008
For further information, please call: (512) 837-9236

♦ ♦ ♦

PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §153.22, §153.84

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") jointly adopt amendments to interpretations 7 TAC §153.22 and §153.84, relating to home equity lending under Texas Constitution, Article XVI, §50(a)(6), (g), and (t)(3). The amendments to 7 TAC §153.22 and §153.84 are adopted with changes to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2101). As a result of comments received, the commissions withdraw the proposed amendments to 7 TAC §153.51.

The commissions received five comments on the proposal from the following parties: two comments from the Independent Bankers Association of Texas ("IBAT"), and one comment each from the Texas Mortgage Bankers Association ("TMBA"), Brown, Fowler & Alsup, P.C., and Black, Mann & Graham, L.L.P. The comment from Brown, Fowler & Alsup, P.C. is generally opposed to the proposed amendments and states that "if adopted as currently worded, [the amendments] would impose a burdensome procedure upon home equity lenders and title companies conducting closings that was not intended by the legislature . . . ." On the other hand, one of the IBAT comments is supportive, stating: "Community banks appreciate the clarity that the interpretations provide to them in complying with these complicated provisions." Overall, the comments may be characterized as issue-oriented and seek to obtain the best clarification possible on the recent amendments to the Texas Constitution. Each issue commented upon is addressed following the purpose paragraph for the interpretation receiving the comment.

Texas Constitution, Article XVI, §50 ("Section 50"), sets out the only permissible encumbrances on a homestead. Pursuant to Section 50(u), as implemented by Texas Finance Code, §11.308 and §15.413, the power to interpret Section 50(a)(5) - (7), (e) - (p), and (t) of the Texas Constitution has been separately and independently delegated to the commissions, subject to the statutory admonition that the commissions strive for consistency in the exercise of this independent authority. The commissions have jointly adopted the home equity lending interpretations codified in 7 TAC Chapter 153.

Section 50 was amended effective December 4, 2007, pursuant to voter approval of Proposition 8 (House Joint Resolution Number 72), proposed in the 80th Texas Legislative Session. In general, the purpose of the amendments to §153.22 and §153.84 is to conform with the constitutional changes in Section 50. The individual purposes of the amendments to each section are provided in the following paragraphs.

The amendments to §153.22 outline the lender's obligation to provide copies of certain documents at closing, as required by amended Section 50(a)(6)(Q)(v), including a copy of the final loan application and all documents that are signed by the owner at closing.

One commenter suggests that the phrasing of the first sentence be changed from "the lender must provide" to the "owner must receive," in reference to the final loan application and documents signed by the owner at closing. The commissions first would like to note that this revision is a comment on existing language not being amended. Furthermore, the commenter's change in phrasing is merely a distinction in wording without a difference in meaning. Thus, the commissions decline the commenter's suggestion and will maintain the current wording.

Two commenters request that the word "executed" be added in the first sentence before the word "documents" in order to better track the constitutional changes. As explained by one commenter, "The word 'executed' was added to Section 50(a)(6)(Q)(v) to clarify that the copies of the loan documents signed by the owner at closing must be copies after the owner has signed them; otherwise, the word 'executed' is superfluous." The commissions agree with this recommendation and have added "executed" to the first sentence of §153.22 for this adoption.

One commenter poses the following question: "Could the lender provide a single copy of all of the documents to one spouse at closing and satisfy this requirement [of providing the owner with copies] or should two complete duplicate copies be provided to both spouses?" The commissions agree that clarification on this point would be helpful, and have added the following new second sentence to §153.22 for this adoption: "One copy of these documents may be provided to married owners."

One commenter states that "it is confusing to add the phrase, *'With the exception of the final loan application, the'* as part of the second sentence dealing with pre-closing documents because the final loan application is not provided to or executed by the owner prior to closing." Additionally, three other commenters request that the word "final" be deleted from the second sentence of the proposed amendments to §153.22 (the "final" being referenced is included in the italicized phrase quoted earlier). The commissions agree with these comments and have deleted the italicized phrase from §153.22 for this adoption.

Two commenters raise concerns regarding the addition of the words "at closing" to the Texas Constitution and the resulting limitations on documents that must be provided. One commenter summarizes the issue as follows: "The words 'at closing' were added to Section 50(a)(6)(Q)(v) to expressly limit the requirement to provide the owner with copies of documents related to the home equity loan only to the documents signed by the owner at closing. Thus, there is no longer any authority for the Commissions to require that copies of post-closing documents signed after the date of closing be provided to the owner."

The commissions agree with the commenters and have revised §153.22 accordingly. As a result, the third sentence has experienced three modifications: (1) The phrase "The lender is not required" has been replaced with "This requirement does not obligate the lender," (2) the addition of "or after" before the word "closing," and (3) the deletion of everything after the word "closing." Therefore, the third and now final sentence of §153.22 reads as follows for this adoption: "This requirement does not obligate the lender to give the owner copies of documents that were signed by the owner prior to or after closing." Please note, however, that this language is not intended to affect the lender's obligation to provide a copy of the loan application, if not previously provided, and a final itemized disclosure prior to closing under Section 50(a)(6)(M)(ii) of the Constitution.

The proposed amendments to §153.51 were intended to clarify the lender's obligation to provide a copy of the application at least one business day prior to closing, as required by amended Section 50(a)(6)(M)(ii). The commissions never intended the proposed language to require that lenders provide a copy of the final loan application prior to closing. The commissions agree with three commenters who stated that the Texas Constitution does not impose such a requirement. In fact, the commissions' intent was to implement the intent of the legislature, which was well summarized by a commenter as follows: " [T]he intent of the legislature is that lenders with respect to any home equity loan are required to provide home owners (i) a copy of their loan application at least one day prior to closing *only* if the lender has not previously provided the owners a copy of their signed application form at the time of application, and (ii) a copy of the final form of the loan application at the time of closing."

Moreover, two commenters brought to the commissions' attention that the proposed amendments to §153.51 were misplaced and as explained by one commenter "should instead be more appropriately proposed as amendments to §153.13, which specifically interprets the Preclosing Disclosures required under subsection (a)(6)(M)(ii) . . . ." The commissions agree that the proposed amendments to §153.51 would be better suited as proposed amendments to §153.13. Due to the reasons outlined by the two preceding paragraphs, the commissions withdraw the proposed amendments to §153.51 and are proposing new amendments to §153.13 separately in this issue of the *Texas Register*.

The amendments to §153.84 implement the prohibition on the owner's use of preprinted checks unsolicited by the borrower to obtain a HELOC advance, as required by amended Section 50(t)(3). New paragraph (2) clarifies that the borrower may not request that the lender periodically send preprinted checks to the borrower. Current paragraphs (3) and (4) of §153.84 have been deleted, as these definitions are unnecessary due to the constitutional changes.

One commenter suggests that new §153.84(2) "should clarify that the borrower may not *at closing* request the lender to periodically send preprinted checks to the borrower." The commissions believe that the addition of this phrase would permit a false inference, i.e. that the day or week after closing, borrowers could engage in this prohibited practice. The prohibition on borrowers requesting that lenders periodically send preprinted checks is a comprehensive prohibition, effective at closing, the day after closing, six months after closing, and so on.

The floor remarks made by Representative Burt Solomons for purposes of legislative intent are instructive on this issue: "The phrase, preprinted checks not solicited by the borrower, means checks that a person sometimes gets in the mail inviting them to borrow money. If the borrower requests these checks, then he can use the checks. However, if a borrower can sign a piece of paper when they take out a home equity loan or a line of credit that says, 'I want the lender to send me checks periodically,' that is not okay. That is not the intent of this provision. A borrower must request the lender to send them the checks, which is what 'solicited by the borrower' means. We do not want homeowners with these accounts to be unnecessarily encouraged to borrow money against their home, and I want to make it very clear what the intent of this provision is for any state agency or court that needs help interpreting it." H.J. OF TEX., 80th Leg., R.S. 2431 (2007). Thus, the commissions decline the commenter's suggestion. The same commenter believes that "it would appear permissible to include a reorder form at the end of the pad [of preprinted checks previously ordered]." The commenter also suggests that lenders could provide "special checks" at the borrower's request. While the commissions believe that the term "special checks" is too ambiguous for use as a permitted item, the use of a reorder form would be permissible under this section. Therefore, the following second sentence has been added to §153.84(2) for this adoption: "A borrower may use a check reorder form, which may be included with preprinted checks, as a means of requesting a specific number of preprinted checks."

Also regarding §153.84(2), the commenter states: "It would also be useful to provide an example of what *is* permitted." The commissions believe that the legislative intent quoted previously shows that a lawful request under this requirement must meet the following elements: be from the borrower, be a request that the lender provide checks to access the home equity line of credit (HELOC), and not contain periodic language or an on-going request. In the commissions' view, the first sentence of §153.84(2) embodies these elements and fulfills the legislature's intent. Finally, the addition of the reorder form

to the interpretation is an example of how a borrower is able to request preprinted checks from the lender. To the extent that the commenter requests an example beyond the reorder form, the commissions decline to adopt additional examples of permissible requests.

The amended interpretations are adopted pursuant to Texas Finance Code, §11.308 and §15.413, which separately and independently authorize each commission to issue interpretations of the Texas Constitution, Article XVI, §50(a)(5) - (7), (e) - (p), (t), and (u), subject to Texas Government Code, Chapter 2001.

The Texas Constitution, Article XVI, §50(a)(6), (g), and (t)(3) are affected by the adopted amendments.

§153.22. Copies of Documents: Section 50(a)(6)(Q)(v).

At closing, the lender must provide the owner with a copy of the final loan application and all executed documents that are signed by the owner at closing in connection with the equity loan. One copy of these documents may be provided to married owners. This requirement does not obligate the lender to give the owner copies of documents that were signed by the owner prior to or after closing.

§153.84. Restrictions on Devices and Methods to Obtain a HELOC Advance: Section 50(t)(3).

A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which an owner is prohibited from using a credit card, debit card, or similar device, or preprinted check unsolicited by the borrower to obtain a HELOC advance.

(1) A lender may offer one or more non-prohibited devices or methods for use by the owner to request an advance. Permissible methods include contacting the lender directly for an advance, telephonic fund transfers, and electronic fund transfers. Examples of devices that are not prohibited include prearranged drafts, preprinted checks requested by the borrower, or written transfer instructions. Regardless of the permissible method or device used to obtain a HELOC advance, the amount of the advance must comply with:

(A) the advance requirements in Section 50(t)(2);

(B) the loan to value limits in Section 50(t)(5); and

(C) the debit or advance limits in Section 50(t)(6).

(2) A borrower may from time to time specifically request preprinted checks for use in obtaining a HELOC advance but may not request the lender to periodically send preprinted checks to the borrower. A borrower may use a check reorder form, which may be included with preprinted checks, as a means of requesting a specific number of preprinted checks.

(3) An owner may, but is not required to, make in-person contact with the lender to request preprinted checks or to obtain a HELOC advance.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803218
Leslie L. Pettijohn
Consumer Credit Commissioner
Joint Financial Regulatory Agencies
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 936-7621

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts amendments to §§80.3, 80.90, 80.93 and 80.100. Section 80.100 is adopted with non-substantive changes to the text as published in the April 11, 2008, issue of the *Texas Register* (33 TexReg 2881) and will be republished. Sections 80.3, 80.90, and 80.93 are adopted without changes and will not be republished.

The adopted amendments add additional rules and forms to comply with House Bill 1460 that was passed by the 80th Legislature (2007 Regular Session) and became effective on January 1, 2008.

The rules are effective thirty (30) days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

There were no comments received during the comment period and no requests were received for a public hearing to take comments on the rules.

Except as noted below, the rules as proposed on April 11, 2008, are adopted as final rules with the following non-substantive changes.

Section 80.100(a) - Renumbered list because the proposed form (39) is being withdrawn to re-propose with substantive changes.

Section 80.100(b)(39) - Withdrawing Statement from Tax Assessor-Collector and renumbered subsection (b)(40) to (b)(39).

Figure: 10 TAC §80.100(b)(39) - Withdrawing the new Statement from Tax Assessor-Collector form to re-propose with substantive changes regarding payment of estimated taxes for the present year and placing the payment in escrow. Renumbered the Notice of Intent to Acquire Ownership of an Abandoned Manufactured Home form from §80.100(b)(40) to (b)(39).

Section 80.100(b)(40) - Renumbered subsection (b)(41) to (b)(40).

Figure: 10 TAC §80.100(b)(40) - Renumbered the Affidavit of Fact for Abandonment form from §80.100(b)(41) to (b)(40).

Section 80.100(b)(41) - Renumbered subsection (b)(42) to (b)(41).

Figure: 10 TAC §80.100(b)(41) - Renumbered the Disclosure to Consumer if Financing Does Not Close from §80.100(b)(42) to (b)(41).

Section 80.100(b)(42) - Renumbered subsection (b)(43) to (b)(42).

Figure: 10 TAC §80.100(b)(42) - Renumbered the Application for Salesperson's License Renewal form from §80.100(b)(43) to (b)(42).

Section 80.100(b)(43) - Renumbered subsection (b)(44) to (b)(43).

Figure: 10 TAC §80.100(b)(43) - Renumbered the Application for Instruction Providers from §80.100(b)(44) to (b)(43).

Section 80.100(b)(44) - Removed paragraph because it is renumbered as §80.100(b)(43).

Figure: 10 TAC §80.100(b)(44) - Moved Application for Instruction Providers form to §80.100(b)(43).

The following is a restatement of the rules' factual basis:

Section 80.3(m) is adopted (without changes) relating to fee refunds by the Department to comply with §1201.059(d) of the Standards Act.

Section 80.90(g) is adopted (without changes) to add a new subsection for the holder or servicer of loan to elect a home real property when the title company or attorney fails to complete conversion. The new subsection is added to comply with §1201.2055(i)(3) of the Standards Act.

Section 80.90(h) is adopted (without changes) to add a new subsection for requiring an affidavit of fact when submitting an application for SOL pursuant to the abandonment provision in §1201.217 of the Standards Act.

Figure: 10 TAC §80.93(b) is adopted (without changes) to revise the tax lien layout form because the Department cannot accept dummy numbers (999-999-99) in lieu of a taxing entity number or central tax collector number when filing a lien.

Section 80.100(a) is adopted (with changes) to amend the list of forms by revising existing forms and adding new forms to the list.

Figure: 10 TAC §80.100(b)(1) is adopted (without changes) to revise the Application for Manufacturer's License by adding a column for the date of birth.

Figure: 10 TAC §80.100(b)(2) is adopted (without changes) to revise the Application for License for a Retailer, Broker, Installer and/or Rebuilder by adding a column for the date of birth.

Figure: 10 TAC §80.100(b)(4) is adopted (without changes) to revise the Application for Salesperson's License by updating the education requirements information in the certification section.

Figure: 10 TAC §80.100(b)(16) is adopted (without changes) to revise the Notice of Installation form by removing the Installation Decal Number field because the proposal to issue decal numbers was not implemented when new rules were adopted in December of 2007, corrected the number of days required to submit the form from 15 to 7 days to comply with the Standards Act, and added a section for the Department to report the inspection results.

Figure: 10 TAC §80.100(b)(19) is adopted (without changes) to revise the Application for Statement of Ownership and Location by adding 2(b), 4(c), 4(d), home identification at the top of the 2nd page, and lienholder contact information in Block 8.

Figure: 10 TAC §80.100(b)(20) is adopted (without changes) to delete the Application for Correction to a Statement of Ownership and Location and replace it with new Affidavit of Fact for Real Property form.

Figure: 10 TAC §80.100(b)(24) is adopted (without changes) to replace the Affidavit of Fact for Incomplete SOL with Addendum to Application for SOL that does not require the form to be notarized.

Figure: 10 TAC §80.100(b)(31) is adopted (without changes) to revise the Notice of Lien to Perfect a Lien (Other than Tax Lien) by removing the requirement to notarize signatures in Block 3 and adding Block 4 for lien assignments.

Figure: 10 TAC §80.100(b)(32) is adopted (without changes) to revise Notification of Filing Status as a Central Tax Collector by correcting the block number for Notarized Signature Required from Block 3 to Block 4 and the number on page 2 from Block 2 to Block 3.

Figure: 10 TAC §80.100(b)(35) is adopted (without changes) to revise form by adding requirement to attach list of related persons as required by §1201.103 of the Standards Act.

Figure: 10 TAC §80.100(b)(38) is adopted (without changes) to add new Probationary Installation (Form T) form to comply with §1201.104(f) of the Standards Act.

Figure: 10 TAC §80.100(b)(39) is withdrawn to add new Statement from Tax Assessor-Collector form to meet requirements of §1201.206(g) of the Standards Act.

Figure: 10 TAC §80.100(b)(40) is adopted (with changes) to add new Notice of Intent to Acquire Ownership of an Abandoned Manufactured Home form to comply with §1201.217 of the Standards Act. Renumbered form from (b)(40) to (b)(39).

Figure: 10 TAC §80.100(b)(41) is adopted (with changes) to add new Affidavit of Fact for Abandonment form to comply with §1201.217 of the Standards Act. Renumbered form from (b)(41) to (b)(40).

Figure: 10 TAC §80.100(b)(42) is adopted (with changes) to add new Disclosure to Consumer relating to occupying a manufactured home before financing is closed required by §1201.513 of the Standards Act. Renumbered form from (b)(42) to (b)(41).

Figure: 10 TAC §80.100(b)(43) is adopted (with changes) to add new Application for Salesperson's License Renewal to comply with §1201.103 of the Standards Act. Renumbered form from (b)(43) to (b)(42).

Figure: 10 TAC §80.100(b)(44) is adopted (with changes) to add new Application for Educational Instruction Providers to comply with §1201.104(e) of the Standards Act and 10 TAC, Chapter 80, §80.41(c). Renumbered form from (b)(44) to (b)(43).

SUBCHAPTER A. CODES, STANDARDS, TERMS, FEES AND ADMINISTRATION

10 TAC §80.3

The amendments are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014 and §2306.6020, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 19, 2008.

TRD-200803169

Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: August 3, 2008
Proposal publication date: April 11, 2008
For further information, please call: (512) 475-2206

♦ ♦ ♦

SUBCHAPTER H. STATEMENTS OF OWNERSHIP AND LOCATION

10 TAC §80.90, §80.93

The amendments are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014 and §2306.6020, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 19, 2008.

TRD-200803170
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: August 3, 2008
Proposal publication date: April 11, 2008
For further information, please call: (512) 475-2206

♦ ♦ ♦

SUBCHAPTER I. FORMS

10 TAC §80.100

The amendments are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014 and §2306.6020, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by the amendments.

§80.100. List of Forms.

(a) The following list is in numerical order with the forms located in subsection (b) of this section.

(1) Application for Manufacturer's License.

(2) Application for Retailer, Broker, Installer and/or Rebuilder's License.

(3) Application for Retailer with Branch Locations License.

(4) Application for Salesperson's License.

(5) Licensing Surety Bond.

(6) Licensing Security Agreement.

(7) Manufacturer's Certificate of Origin (MCO).

(8) Consumer Disclosure Statement.

(9) Warranty and Disclosure for a Used Manufactured Home.

(10) Retail Monitoring Checklist.

(11) Consumer Notice of Licensed and Bonded Location.

(12) Notice and Informed Consent to Installation on an Improperly Prepared Site.

(13) Formaldehyde Notice.

(14) Texas Inventory Finance Security Form.

(15) Broker Disclosure Form.

(16) Notice of Installation (Form T).

(17) Installation Checklist.

(18) Estimate for Reassigned Warranty Work.

(19) Application for Statement of Ownership and Location.

(20) Affidavit of Fact for Real Property.

(21) Affidavit of Fact.

(22) Affidavit of Error.

(23) Affidavit of Fact for Right of Survivorship.

(24) Addendum to Application for SOL.

(25) Release or Foreclosure of Lien (Form B).

(26) Statement of Inheritance (Form C).

(27) Taxing Entity Application for Texas Seal (Form S).

(28) Multiple Application Log (Form M).

(29) Instructions to Third Party Closer.

(30) Notice of Lien for Tax Lien/Release Form.

(31) Notice of Lien to Perfect a Lien (Other than Tax Lien) Form.

(32) Notification of filing status as a Central Tax Collector.

(33) Site Preparation Notice Form.

(34) Sample of Statement of Ownership and Location.

(35) Application for License Renewal (other than a salesperson).

(36) Right of Rescission Waiver Form.

(37) List of Unlicensed Installers Form.

(38) Probationary Notice of Installation (Form T).

(39) Notice of Intent to Acquire Ownership of an Abandoned Home.

(40) Affidavit of Fact for Abandonment.

(41) Disclosure to Consumer (Possible Need to Vacate Home if Financing does not Close).

(42) Application for Salesperson's License Renewal.

(43) Application for License Instruction Provider.

(b) Forms.

(1) Application for Manufacturer's License.
Figure: 10 TAC §80.100(b)(1)

(2) Application for Retailer, Broker, Installer and/or Rebuilder's License.
Figure: 10 TAC §80.100(b)(2)

(3) Application for Retailer with Branch Locations License.
Figure: 10 TAC §80.100(b)(3) (No change.)

(4) Application for Salesperson's License.
Figure: 10 TAC §80.100(b)(4)

(5) Licensing Surety Bond.
Figure: 10 TAC §80.100(b)(5) (No change.)

(6) Licensing Security Agreement.
Figure: 10 TAC §80.100(b)(6) (No change.)

(7) Manufacturer's Certificate of Origin (MCO).
Figure: 10 TAC §80.100(b)(7) (No change.)

(8) Consumer Disclosure Statement.
Figure: 10 TAC §80.100(b)(8) (No change.)

(9) Warranty and Disclosure for a Used Manufactured Home.
Figure: 10 TAC §80.100(b)(9) (No change.)

(10) Retail Monitoring Checklist.
Figure: 10 TAC §80.100(b)(10) (No change.)

(11) Consumer Notice of Licensed and Bonded Location.
Figure: 10 TAC §80.100(b)(11) (No change.)

(12) Notice and Informed Consent to Installation on an Improperly Prepared Site.
Figure: 10 TAC §80.100(b)(12) (No change.)

(13) Formaldehyde Notice.
Figure: 10 TAC §80.100(b)(13) (No change.)

(14) Texas Inventory Finance Security Form.
Figure: 10 TAC §80.100(b)(14) (No change.)

(15) Broker Disclosure Form.
Figure: 10 TAC §80.100(b)(15) (No change.)

(16) Notice of Installation (Form T).
Figure: 10 TAC §80.100(b)(16)

(17) Installation Checklist.
Figure: 10 TAC §80.100(b)(17) (No change.)

(18) Estimate for Reassigned Warranty Work.
Figure: 10 TAC §80.100(b)(18) (No change.)

(19) Application for Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(19)

(20) Affidavit of Fact for Real Property.
Figure: 10 TAC §80.100(b)(20)

(21) Affidavit of Fact.
Figure: 10 TAC §80.100(b)(21) (No change.)

(22) Affidavit of Error.
Figure: 10 TAC §80.100(b)(22) (No change.)

(23) Affidavit of Fact for Right of Survivorship.
Figure: 10 TAC §80.100(b)(23) (No change.)

(24) Addendum to Application for SOL.
Figure: 10 TAC §80.100(b)(24)

(25) Release or Foreclosure of Lien (Form B).
Figure: 10 TAC §80.100(b)(25) (No change.)

(26) Statement of Inheritance (Form C).
Figure: 10 TAC §80.100(b)(26) (No change.)

(27) Taxing Entity Application for Texas Seal (Form S).
Figure: 10 TAC §80.100(b)(27) (No change.)

(28) Multiple Application Log (Form M).
Figure: 10 TAC §80.100(b)(28) (No change.)

(29) Instructions to Third Party Closer.
Figure: 10 TAC §80.100(b)(29) (No change.)

(30) Notice of Lien for Tax Lien/Release Form.
Figure: 10 TAC §80.100(b)(30) (No change.)

(31) Notice of Lien to Perfect a Lien (Other than Tax Lien) Form.
Figure: 10 TAC §80.100(b)(31)

(32) Notification of filing status as a Central Tax Collector.
Figure: 10 TAC §80.100(b)(32)

(33) Site Preparation Notice Form.
Figure: 10 TAC §80.100(b)(33) (No change.)

(34) Sample of Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(34) (No change.)

(35) Application for License Renewal (other than a salesperson).
Figure: 10 TAC §80.100(b)(35)

(36) Right of Rescission Waiver Form.
Figure: 10 TAC §80.100(b)(36) (No change.)

(37) List of Unlicensed Installers Form.
Figure: 10 TAC §80.100(b)(37) (No change.)

(38) Probationary Notice of Installation (Form T).
Figure: 10 TAC §80.100(b)(38)

(39) Notice of Intent to Acquire Ownership of Abandoned Manufactured Home.
Figure: 10 TAC §80.100(b)(39)

(40) Affidavit of Fact for Abandonment.
Figure: 10 TAC §80.100(b)(40)

(41) Disclosure to Consumer (Possible Need to Vacate Home if Financing does not close).
Figure: 10 TAC §80.100(b)(41)

(42) Application for Salesperson's License Renewal.
Figure: 10 TAC §80.100(b)(42)

(43) Application for License Instruction Providers.
Figure: 10 TAC §80.100(b)(43)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 19, 2008.

TRD-200803171

Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: August 3, 2008
Proposal publication date: April 11, 2008
For further information, please call: (512) 475-2206

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.216

The Public Utility Commission of Texas (commission or PUC) adopts new §25.216, relating to *Selection of Transmission Service Providers* with changes to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9479).

The rule establishes a process for entities interested in constructing and operating certain transmission improvements to submit expressions of interest to the commission and for the commission to select the entity or entities responsible for constructing the transmission improvements, and addresses any requirements deemed appropriate by the commission to ensure that such entities complete the ordered improvements in a timely and cost-effective manner. This rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). The rule is adopted under Project Number 34560.

The commission received written comments on the rule and a question posed by the commission from AEP Texas Central Company, AEP Texas North Company, and Electric Transmission Texas, LLC (AEP/ETT); Airtricity, Inc., whose name subsequently changed to E.ON Climate & Renewables North America, Inc., and PPM Energy, Inc., whose name subsequently changed to Iberdrola Renewables, Inc. (E.ON/Iberdrola); Brazos Electric Power Cooperative, Inc. (Brazos); CenterPoint Energy Houston Electric, LLC (CenterPoint); Electric Reliability Council of Texas, Inc. (ERCOT); Eurus Energy America Corporation (Eurus); Horizon Wind Energy (Horizon); ITC Panhandle Transmission, LLC (ITC); Joint Commenters (AEP Texas Central Company, AEP Texas North Company, CenterPoint, CPS Energy, Eurus, Horizon, LCRA, and Oncor); Lower Colorado River Authority Transmission Services Corp. (LCRA); Lone Star Transmission, LLC (Lone Star); Luminant Energy Company, LLC and Luminant Generation Company, LLC (Luminant); Oncor Electric Delivery Company, LLC (Oncor); Sharyland Utilities, LP (Sharyland); South Texas Electric Cooperative, Inc. (STEC); Texas Coalition of Cities for Utility Issues (Cities); Texas Farm Bureau; Texas Industrial Energy Consumers (TIEC); Trans-Elect Texas, LLC (Trans-Elect); and Senator Royce West.

The commission received written reply comments from AEP/ETT, CenterPoint, E.ON/Iberdrola, Cities, ERCOT, ITC, Joint Commenters, LCRA, Lone Star, Luminant, Oncor, Sharyland, STEC, the Wind Coalition, and TIEC.

A public hearing on the rule was held at the commission offices on February 12, 2008, at 9:30 a.m. Representatives from AEP/ETT, CenterPoint, E.ON/Iberdrola, ERCOT, Horizon, Lone Star, LCRA, Oncor, Sharyland, STEC, TIEC, and the Wind Coalition provided comments.

In addition to seeking comments on the rule, the commission posed one question for comments:

Are there other provisions that should be considered to provide incentives to TSPs to obtain right-of-way by agreement with landowners without increasing the overall cost of the line?

The Texas Farm Bureau recommended that transmission service providers (TSPs) be required to negotiate in good faith with affected property owners and pay attorneys' fees for landowners in some cases. AEP/ETT, CenterPoint, E.ON/Iberdrola, Oncor, and STEC responded that the Texas Farm Bureau's recommendation to pay attorneys' fees in some cases is outside the commission's jurisdiction and would invite appeal. LCRA stated that the Texas Farm Bureau's "bona fide offer" language is superfluous given §21.0112 of the Texas Property Code. LCRA and Oncor stated that the Texas Farm Bureau's proposal to require attorneys' fees if the Designated TSP's offer does not match the condemnation award would greatly increase the cost and time required for transmission projects, and would encourage lawyers charging contingent fees to sue even where the difference in amounts would be minimal.

Commission Response

TSPs' existing incentives are sufficient. By obtaining right-of-way by agreement, TSPs avoid the time and expense of condemnation litigation and foster good relations with landowners, with whom they will have ongoing relationships.

General Comments--Comments For or Against Adoption

Lone Star and Sharyland were for adoption of the rule, with changes. Brazos, E.ON/Iberdrola, ERCOT, ITC, Luminant, Texas Farm Bureau, and TIEC proposed changes to the rule without expressly addressing whether they were for or against its adoption. AEP/ETT, CenterPoint, Cities, CPS Energy, Eurus, Horizon, LCRA, Oncor, STEC, and the Wind Coalition were against adoption of the rule. AEP/ETT, Cities, Joint Commenters, Oncor, STEC, and the Wind Coalition stated that the rule's complex and burdensome processes and financial requirements would delay transmission improvements and add costs that would offset the alleged benefits of a competitive selection process. AEP/ETT stated that the rule would introduce a risk of appeal that could potentially cause undue delay. CenterPoint stated that the legislative intent was to expedite transmission to wind-rich areas, and any delay caused by a burdensome rule would be counter to that intent. STEC stated that the proposed rule ignores ERCOT nodal protocols. Cities stated that no material advantage in schedule or cost will likely be achieved through the selection of TSPs on a competitive basis but that potential ownership and operating risks will result from such a process. Cities also stated that even if the TSPs are allowed to bid on projects, only the incumbent TSPs

should participate, because entrants will lead to duplication of transmission investment and operating costs.

Commission Response

The competitive selection process required by the rule will ensure that the commission develops a transmission plan for delivering electricity from competitive renewable energy zones (CREZs) that is most beneficial and cost-effective to electric customers, as required by PURA §39.904(g). The competitive selection process will provide TSPs with an incentive to minimize costs and provide innovative solutions.

General Comments--Use of Existing ERCOT Process

AEP/ETT, CenterPoint, Joint Commenters, Oncor, and STEC recommended that the rule be withdrawn and that the current ERCOT Power System Planning Charter and Process be applied. AEP/ETT stated that the current system ensures clear ownership and quick response time for stability and security and that a designation method should not be adopted if it adds time relative to the existing ERCOT processes. ERCOT, however, stated that the existing ERCOT processes do not anticipate or accommodate selecting entities that are not currently TSPs. ERCOT stated that if it were assigned TSP selection, it would need new processes and criteria; the commission rather than ERCOT should decide such processes and criteria, and they should be consistent with requirements already set by the North American Electric Reliability Corporation (NERC), the commission, and the ERCOT Protocols and Operating Guides. Lone Star and TIEC stated that Senate Bill (SB) 20 and the need for new processes to accommodate non-incumbency areas demonstrate that the existing process is not sufficient. Sharyland stated that selecting TSPs according to ERCOT incumbency would unfairly delay development in non-incumbency areas relative to areas where an incumbent exists. Trans-Elect stated that existing ERCOT processes were insufficient to address TSP selection for developing CREZ transmission.

Commission Response

The commission concludes that a new process needs to be used for the selection of Designated TSPs for CREZ Transmission Plan Facilities (CTP Facilities). As pointed out by several commenters, the ERCOT procedures do not contemplate the selection of a TSP to build transmission outside of the footprint of ERCOT TSPs. Also, ERCOT does not have a process to select a TSP for a transmission project when several entities desire to build a project. The commission recognizes that the adoption of the rule and its designation of TSPs under the rule raise the risk of litigation, but the commission believes that companies that have indicated an interest in constructing CREZ transmission facilities but are not operating as TSPs in ERCOT today could challenge the designation of TSPs under the existing ERCOT procedures, through a complaint at the commission. Whether the commission adopts the rule or not, there is a likelihood of challenges to the designation of TSPs for CTP Facilities. The commission concludes that selection criteria based on the capability of the TSPs and the cost and schedule terms they offer for CTP Facilities provide greater benefits for customers and developers of wind projects, and are fairer to the TSPs than a process that relies heavily or exclusively on incumbency as a selection criterion.

General Comments--Alternative Proposals

The Joint Commenters and Horizon proposed that, to save time, TSPs that own both endpoints of a given project should be designated as the default builder; otherwise projects should be joint projects shared by the TSPs owning each endpoint. Sharyland observed that the Joint Commenters' proposal to consider non-incumbent TSP selection in new areas would encourage TSP diversity; Horizon stated that it would allow incumbents to focus on upgrades and thereby shorten the overall CREZ timeline. E.ON/Iberdrola stated that the Joint Commenters' proposal contemplates ordering all construction pursuant to PURA §39.203(e), which would eliminate considerations in PURA §37.056(c)(1) - (3) and (4)(E), but the CREZ statute only states that §37.05(c)(1) and (2) considerations are not necessary. Eliminating considerations in §37.056(c)(3) and (4)(E) would affect rate cases by automatically finding facilities used and useful, prudent and includable, regardless of actual use, and would grant the TSP the ability to employ construction work in progress (CWIP). E.ON/Iberdrola also stated that although the Joint Commenters' "default to incumbent" proposal would work quickly, the CREZ rule contemplates TSP selection after the issuance of the final order in Docket Number 33672. Sharyland stated that although the Joint Commenters' proposal provides a detailed procedure for selection that would expedite the process, the "default to incumbent" aspect should be eliminated.

Commission Response

The commission concludes that CREZ Facilities that involve an upgrade of an existing line generally will be designated to the incumbent TSP that owns the line to be upgraded, because to do otherwise would create coordination difficulties with the operating and maintenance functions. However, in the adopted rule, the commission has also made explicit that the commission can select a TSP other than the owner of the existing facilities if the owner requests that a different Interested TSP be selected or good cause exists to select another TSP. In cases not involving an upgrade to an existing line, the incumbent TSP will compete with the other Interested TSPs to assure the transmission improvements deliver energy in a manner that is most beneficial and cost-effective to customers.

E.ON/Iberdrola proposed a "slimmed-down" rule that identifies general criteria for what constitutes "most beneficial and cost-effective" when selecting a TSP for a given project. It then identified the specific criteria that various parties had suggested as indicative of "most beneficial and cost-effective" in earlier filings and comments. It stated that, under this alternative rule, the commission would have discretion to weigh the criteria when reviewing proposals. In the event that only one proposal is submitted for a given project, expedited review and approval could be allowed. It stated that there would likely be a tendency for TSPs to seek projects within their existing territories. In areas that lack an incumbent, it would be more likely that multiple proposals would be submitted for a given project. In such event, settlement could be encouraged. Horizon expressed concern that the proposal by E.ON/Iberdrola would result in multiple contested cases and effectively disadvantage the Panhandle area in terms of expediency. CenterPoint stated that if the criteria proposed by E.ON/Iberdrola are adopted, the commission should also consider the corporate structure of the entities providing transmission service and require that entrants comply with the same code of conduct provisions to which incumbent providers adhere. CenterPoint also stated that project-by-project review of specific criteria might not capture inefficiencies in the aggregate and thus fail to realize the "most beneficial and cost-effective" solution. It also stated that circumstances may dictate that some projects be processed more slowly than others.

Oncor did not support the process presented by E.ON/Iberdrola, because the process would likely be protracted. Oncor proposed certain modifications to the process and criteria proposed by E.ON/Iberdrola in the event the Commissioners elect to adopt that approach. Horizon stated that the rule proposed by E.ON/Iberdrola would further extend the timelines for completing CREZ transmission projects because even if only one TSP applied for a given project it would still be treated as a contested case, and in cases where multiple TSPs are interested, there would be no mechanism for resolving issues early in the process. Horizon advocated an approach where all issues and projects would be addressed in a single contested case, as opposed to creating distinct cases for each project. Lone Star expressed support for the alternative proposal suggested by E.ON/Iberdrola and stated that it might take less time to implement such a rule compared to a settlement proceeding among all the parties.

Commission Response

The commission believes that adopting a rule with specific TSP selection criteria in conjunction with a settlement process will provide for the expeditious completion of the CTP Facilities. As noted above, the commission believes that any approach to selecting TSPs poses litigation risks. Specifying criteria and a process for the selection of Designated TSPs should reduce, rather than increase, this risk. E.ON/Iberdrola presented a four-part recommendation that would streamline the process by moving the pre-qualification into the selection process, allowing the TSP to propose projects directly based on the CREZ Transmission Plan, eliminating the performance-incentive scheme, and providing for the prompt disposition of uncontested proposals. The commission sees merit in this recommendation and has incorporated these features into the rule.

General Comments--Allow the Parties to Decide Designation in a Settlement

Commission staff outlined four different methods for selecting one or more TSPs to build each designated project. The first method provided that the rule would retain the structure in the proposal for publication, where TSPs would need to be pre-qualified generally to build transmission lines prior to expressing interest in a specific project. The second method provided that TSPs would be selected through a settlement conference as proposed by certain parties, and as more fully described herein. The third method provided that the rule would be streamlined to combine the qualification and selection stages, and uncontested proposals for a given project would be considered by the commission on an expedited basis, whereas a TSP would be selected for projects with multiple proposals in a contested case. The fourth method provided a settlement conference but also provided that the rulemaking process would continue simultaneously in case the settlement talks failed to provide a complete solution.

AEP/ETT and Horizon recommended that a collaborative settlement process be initiated in Docket Number 33672 once the transmission plan is adopted, and that such settlement be subject to commission approval. The Joint Commenters recommended that transmission designation be determined through a settlement process, and stated that the commission could resolve any disputes that were not resolved in the settlement discussions. Luminant, Oncor, and the Wind Coalition stated that settlement should be encouraged as a means for expediting the qualification and designation process. Sharyland stated that the commission should encourage a settlement process while still moving forward with the rule adoption process. In addition, it stated that the settlement process should begin promptly, rather than waiting until the specific projects are defined. Third, Sharyland stated that mutual agreement is best and that there are enough projects for all interested and qualified TSPs to build something. Finally, it supported initiating a settlement process in Docket Number 33672, but noted that it would not object to opening a separate proceeding for this purpose, on the condition that it would not delay the settlement process.

TIEC stated that settlement and collaboration should be guided by standards that direct the discussions towards a low-cost solution. Lone Star stated that deferring the selection process to the incumbents would abrogate the commission's responsibility to create a transmission plan and regulate ERCOT transmission concerns, and would raise antitrust concerns. CenterPoint stated that joint projects might require coordination during the project submission process that could raise antitrust concerns. E.ON/Iberdrola discussed antitrust issues and the potential for antitrust concerns under different procedural approaches.

AEP/ETT; Babcock & Brown Renewable Holdings, Inc.; CenterPoint; CPS Energy; Duke Energy Generation Services, Inc.; E.ON/Iberdrola; Eurus; Horizon; LCRA; Mesa Power, LLC; Iberdrola Renewables, Inc.; RES America Developments, Inc.; Sharyland; Shell Wind Energy Inc.; STEC; Texas-New Mexico Power Company; and the Wind Coalition jointly stated that a settlement conference could provide an efficient and effective mechanism for prompt and cost-effective construction of the contemplated transmission lines, and suggested that the commission order that such settlement conference be held in Docket Number 33672. Horizon stated that the proposed settlement discussions would be inclusive of all parties and would expand upon the existing ERCOT process. CenterPoint and Oncor also supported the initiation of a settlement process. Oncor stated that the settlement process should be collaborative, open, non-discriminatory, and non-biased. Trans-Elect advocated an inclusive settlement process and stated that such process should be conducted in this proceeding or in a new docket, rather than in Docket Number 33672.

Lone Star stated that it did not oppose settlement discussions, but stated that the discussions should take place in a proceeding other than Docket Number 33672. Lone Star stated that the CREZ rule and the commission's interim order in the CREZ case both state that the commission will select TSPs after adoption of the final order, and expressed concern about how the proposal to hold settlement talks would function in light of that procedure. It also expressed concern that settlement talks might exclude or marginalize certain parties, specifically entrants. It emphasized the need for focus on the "most beneficial and cost-effective" standard for TSP selection even in the context of a settlement among the parties. Sharyland suggested that a mediator be appointed for the settlement process, such as a senior PUC official, staff official, or possibly an administrative law judge from the State Office of Administrative Hearings. It also stated that in the event of settlement, it would remain the commission's responsibility to make any final decisions such as whether or not to approve the proposed settlement as in the public interest and in compliance with the relevant statute. Sharyland also discussed what might occur if the settlement was rejected by the commission or was non-unanimous, and stated that in such event, it would remain more expedient than the process described in the proposed rule.

Commission Response

A settlement process has the potential to expedite the selection of TSPs. As a result on March 18, 2008 the commission separately ordered the commission staff to conduct settlement negotiations concerning TSP selection. The settlement negotiations are open to all interested parties. In addition, the commission has changed the rule to provide that if a CTP Proposal is supported or unopposed by all parties in the selection proceeding by the deadline to file the CTP Proposal in the selection proceeding, the Interested TSP making the CTP Proposal is not required to file most of the supporting information required by the rule. In that case, the commission expects that Staff and other parties during settlement negotiations will have obtained and reviewed information necessary to determine which TSP to select for particular CTP facilities. The settling parties would be free to submit what information they determined was appropriate to support the settlement. Nevertheless, the rule is still an appropriate means for the commission to resolve disputed issues and judge disputed and undisputed CTP Proposals.

General Comments--Qualification Process

AEP/ETT and Lone Star stated that the qualification process in the rule would cause unnecessary delay and would not bar many parties. CenterPoint, E.ON/Iberdrola, and Sharyland requested that the pre-qualification process be dropped in favor of establishing threshold requirements and considering qualifications more thoroughly in the context of specific proposals. LCRA recommended that proof of qualification be established by identifying dockets where the entity was previously granted a certificate of convenience and necessity (CCN). However, Lone Star and TIEC stated that qualification requirements should apply to all interested parties, because a CCN for a small transmission line does not establish qualification to build a relatively large line. ITC and Lone Star recommended that if the qualification process is kept, it be limited to criteria that can be verified without a contested case. In contrast, TIEC stated that the qualification process should not be self-implementing and qualifications should be thoroughly vetted. Luminant and STEC stated that parties should be able to challenge in a contested case a finding that a TSP is not qualified. Lone Star stated that it is important that entities meet qualification requirements even after the facilities are in service.

Commission Response

The commission has changed the rule to eliminate the separate qualification process, so that qualifications are instead considered in the process for selection of Designated TSPs. This change will reduce the time necessary to select designated TSPs, but still allow for appropriate evaluation of Interested TSPs' qualifications.

General Comments--Competition

Cities and STEC stated that the legislature established transmission as a regulated monopoly not subject to competition, pursuant to PURA §11.002. Lone Star in contrast stated that although transmission service is monopolized, selection of who gets to provide such service is not. CenterPoint stated that the commission lacks legal authority to adopt a competitive process for the provision of transmission service, pursuant to PURA §§11.002(b), 31.001(b), and 39.001(a). It also stated that PURA §39.904(j) supports transmission remaining a regulated service and §39.007 requires a tariff while §32.101 reflects that tariff requirements are regulatory in nature. STEC stated that the rule is not a competition rule subject to judicial review under §39.001(e), while Lone Star stated that it is a competition rule because it was adopted pursuant to Chapter 39 of PURA. LCRA stated that an untried and unproven competitive selection process could delay implementation and be less effective in practice. ITC stated that ratepayers will save billions over the useful life of the CREZ lines; the benefits from fast implementation outweigh smaller gains that might be achieved through an elaborate competitive process. The Wind Coalition emphasized the importance of wind energy and state that expediency outweighed the potential advantage of developing new models for transmission service provider selection.

AEP/ETT, Cities, and Sharyland stated that most costs are already competitively bid or are fixed costs. Cities stated that transmission cost of service is only 10% of the total electricity cost for retail customers, and competitive selection of TSPs would produce small benefits. Cities suggested mandating competitive bidding wherever feasible and requiring documentation to support decisions not to bid competitively. CenterPoint and ITC recommended that competitive bidding not be mandatory.

Commission Response

The commission has the authority to use a competitive selection process for CTP Facilities. PURA §39.904(g) requires that the commission develop a plan to construct transmission facilities needed to serve CREZs. PURA does not specify how the commission is to select the TSPs for CREZ transmission facilities, but PURA §39.904(g) does contain the objective that the transmission facilities be constructed in a manner that is most beneficial and cost-effective to customers. The commission has concluded that a competitive selection process best meets this objective, because it will provide TSPs with an incentive to minimize costs and provide innovative solutions. Concerning the time needed to select TSPs, it is not clear that a different selection process would take less time, in light of the interest expressed by various existing and potential TSPs in CTP Facilities. A settlement process has the potential to expedite the selection of TSPs. As a result, the commission has separately ordered the commission staff to conduct settlement negotiations concerning TSP selection.

This rule is a competition rule subject to judicial review under PURA §39.001(e) and (f), because the provision of transmission service to CREZs is a concept created by the legislature in PURA Chapter 39 and is directly tied to the competitive provision of renewable electricity. The judicial review process pursuant to PURA §39.001(e) and (f) for a competition rule greatly reduces the time to challenge the validity of the rule. As a result, it provides the competitive market certainty, which reduces risk associated with expenditures based on the competition rule. Such certainty for the current rule is very beneficial because of the very large amounts of time and money that will be spent for the CREZ transmission facilities and the wind generation facilities that will locate in the CREZs.

General Comments--Entrants

Cities stated that entrants would duplicate investment and operating costs, which would offset any savings. TIEC stated that it is a mistake to place existing TSPs on the same level as newcomers. STEC stated that "Interested" TSPs should not include entities that do not currently hold a CCN, because the grant of a CCN to an entity that merely "commits" to becoming a utility could be challenged in court and delay implementation. Luminant stated that excluding interested parties from the selection process would invite appeal; Lone Star stated that such ex-

clusion would contradict the commission's preliminary order in Docket Number 34362.

Commission Response

Nothing in PURA prevents selection of an entrant to construct, own, operate, and maintain CTP Facilities if the entrant is adequately qualified and offers the best proposal. The rule contains provisions to ensure that the qualifications of both existing TSPs and entrants are thoroughly evaluated in deciding who to select. The commission believes that entrants in the transmission service market and competition among potential TSPs will result in the delivery of electric output from CREZs in a manner that is the most beneficial and cost-effective to customers.

CenterPoint also stated that the Panhandle area may develop problems if incumbency areas are not established so that it is difficult to ascertain who owns a given line, and because if multiple TSPs serve an area, it would require redundant overhead such as warehouses, district offices, and control centers.

Commission Response

The commission believes that the overhead factors cited by CenterPoint are not as important, in assessing the costs and benefits of a CTP Proposal, as the potential for capital cost savings and expedited completion of projects that may be provided through competition among TSPs.

STEC stated that the commission staff is much reduced in number lately, and expressed concern that if all areas proceed at the same pace and CCNs are thereby not staggered, landowners will be "run over totally" and more litigation would result. E.ON/Iberdrola stated that although it did not support a process that would artificially disadvantage a group or area from timely development, not all CCNs could proceed simultaneously. Horizon stated that although it sought an expedited process, it did not support meeting that goal to the extent that you "run over" landowners, and spoke to its positive track record in working with landowners. The Wind Coalition emphasized the need for equal treatment, but stated that "equal" treatment does not necessarily mean simultaneous, lock-step processing of all CCN projects.

Commission Response

Because of the large amount of transmission facilities that will be included in the CREZ Transmission Plan and the potentially large number of resulting CCN applications, subsection (g)(1) makes clear that the commission has flexibility in establishing a schedule for the filing of CCN applications and retains the flexibility to address scheduling issues as they arise.

General Comments--Use of Historically Underutilized Businesses

Senator Royce West cited PURA §12.252 and recommended that the rule include a requirement that Interested TSPs include specific information in their CTP Proposals about efforts they intend to make to utilize historically underutilized businesses (HUBs). In addition, Senator West recommended that the rule require a subcontracting plan consistent with Texas Government Code §2161.252 and that the commission consider the information in the plan in selecting Designated TSPs.

Commission Response

Pursuant to PURA §§12.251 - 12.555, the commission has changed the rule to require information concerning HUB use and the consideration of HUB use in selection of Designated TSPs other than for electric cooperatives and municipally owned utilities. Although not required, electric cooperative and municipally owned utilities may provide information concerning HUB use.

Subsection (a)

ITC stated that the commission should make it clear in subsections (a) and (b) that the rule applies only to CREZ transmission improvements synchronously interconnected within the ERCOT reliability region.

Commission Response

At this time, the commission does not find justification to warrant the limitation suggested. The commission has decided in its interim decision in Docket Number 33672 that the transmission plan for the initial CREZs will deliver power to ERCOT, but it may be appropriate in the future to use this rule to select Designated TSPs for CTP Facilities that are designed to deliver power outside of ERCOT.

Lone Star sought clarification because the rule expressly applies only to a TSP "that intends to submit an application" but also governs TSP and commission activities occurring after the filing of an application. Also, this subsection applies only to TSPs, not to entities such as Lone Star that has not yet qualified as a TSP.

Commission Response

The commission agrees, and has amended the subsection accordingly.

Subsection (b)

CenterPoint and Lone Star recommended clarification of this subsection by noting that the rule not only governs the selection of TSPs but also these TSPs' performance, rates, and CCNs.

Commission Response

The commission has added a reference to performance, because subsection (f) addresses that topic.

LCRA stated that the commission should have the flexibility to establish three different methods of selecting Designated TSPs.

Commission Response

The commission has included in the rule methods of selecting TSPs that it has concluded are most appropriate, and finds no need to make any additional changes.

Subsection (c)

Oncor stated that the reference to a "new substation" should be deleted from the "CTP Facility" definition in subsection (c)(2) and that an entity responsible for constructing an isolated substation should not be required to complete all of the requirements of the rule in order to construct the substation. LCRA stated that the definition of "Facility" should include circuit or terminal equipment to avoid confusion about who the facility owner is.

Commission Response

If a substation is a CTP Facility, it should be subject to the rule. An isolated substation can be included in a CTP Proposal that includes other CTP Facilities as well. As a result, applying the requirement to an "isolated" substation is not burdensome, and applying the rule to all CTP Facilities ensures that all facilities necessary to serve CREZs will be addressed in a timely and cost-effective manner. The commission has therefore changed the rule accordingly. The commission makes no change in response to LCRA's comment, because the commission has de-

fined CTP Facility in general terms, and adding the specificities that LCRA seeks would not appear to avoid ownership confusion.

Subsection (c)(4)

LCRA recommended that the definition of "Designated TSP" in subsection (c)(4) be amended by changing the term "ordered" to read "designated." This change would incorporate upgraded facilities and those directly designated by the commission.

Commission Response

The commission agrees that the use of the term "designated" is appropriate and has changed the rule accordingly, but notes that upgraded facilities may be designated by the commission as CTP Facilities.

Subsection (c)(5)

ITC stated that the definition of "Interested TSP" needs more clarity so that it is understood that a CCN is not required to participate in transmission planning or to be selected to build transmission. Lone Star stated that the commission should modify the definition or otherwise provide that once a non-utility entity has obtained a CCN, it will be a TSP under P.U.C. Substantive Rule §25.5(143). TIEC recommended a rulemaking to determine how an entity becomes a TSP prior to allowing competition on the level contemplated.

Commission Response

The commission does not agree with the suggested changes. Non-TSPs already participate in transmission planning and the rule is clear that entities not currently TSPs can be selected for CTP Facilities. An entity must own or operate a transmission facility to be a TSP under P.U.C. Substantive Rule §25.5(143). A separate rulemaking is unnecessary, because the rule addresses how an entity that is not currently a TSP can be selected for CTP Facilities.

STEC stated that the commitment provision should be eliminated because an entity may get the project but be challenged in court when applying for a CCN, resulting in delays. Lone Star and TIEC stated that the commitment process needs to be defined. Lone Star proposed that a non-utility simply execute a brief declaration by a corporate officer or similar representative that if designated to build, own, or operate CTP Facilities, it will comply with all laws and commission rules applicable to TSPs. Alternatively, the commission may wish to resolve this "commitment" conundrum by adding the following sentence to the end of the definition: "Such commitment may be demonstrated by satisfying the requirements of subsection (e)."

Commission Response

The commission agrees that the commitment needs clarification and has added in subsection (e) the requirement that an affidavit by an officer of the Interested TSP must be provided. The affidavit affirms the truthfulness of the application and provides reasonable assurance that the Interested TSP will comply with all applicable rules of the commission.

Subsection (d)

Oncor stated that subsection titles "Selection process" and "Selection of Designated TSP" should be combined.

Commission Response

The commission concludes that these two sections are needed for clarification of what is required. The "Selection process" in subsection (d) defines the steps that will be taken in the selection of the TSP. The "Selection of the Designated TSP" in subsection (f) defines the required information and identifies the criteria that will be used to select each designated TSP.

CenterPoint, E.ON/Iberdrola, Oncor, and Sharyland stated that the selection process should be modified to omit the pre-qualification stage in favor of evaluating a TSP's qualifications in conjunction with its proposal to construct specific CREZ facilities. Lone Star stated that the qualification stage should be deleted altogether because it adds more time and little value to the overall evaluation of CTP Proposals. Oncor stated that the pre-qualifying of entities will add both additional administrative expenses and delay.

Commission Response

The commission agrees that the two phases would unnecessarily add time to the selection process, and has therefore combined the qualification phase into the selection phase.

ITC stated that the rule should specify the following objective "safe harbor" minimum criteria that automatically qualify a TSP if met: (1) current holders of Texas CCNs as transmission utilities; (2) those who themselves, or whose affiliates, already operate as electric utilities in other states; and (3) those without a Texas CCN or electric utility operations elsewhere who themselves or their parent have $120,000,000 in owners' equity on the most recent audited financial statements. Sharyland recommended that if the prequalification phase remains in the rule, it should apply only to entities that do not currently hold a CCN in Texas.

Commission Response

The commission agrees that a utility already operating transmission facilities in Texas has adequate financial resources to qualify to submit a CTP Proposal, and has changed the rule accordingly. On the other hand, holding a Texas CCN without operating transmission facilities in Texas or operating as an electric utility outside of Texas does not necessarily provide evidence of these resources. However, the commission has changed the rule to permit an Interested TSP to provide evidence satisfactory to the commission that it has adequate financial resources, which will permit non-traditional entities that may have non-traditional but adequate methods of financing to make a CTP Proposal.

Lone Star, Luminant, Oncor, STEC, and Trans-Elect recommended further clarification of how a TSP qualifies. Lone Star stated that the rule does not set forth the criteria the commission will use to limit the size or type of CTP Facilities for which a Qualified TSP may submit a CTP Proposal and the criteria by which the commission will evaluate the information submitted in a Qualified TSP application. Oncor recommended that in subsection (d)(1) and (4) the phrase "other relevant information" should be clarified with specific information or examples of the types of information that is relevant. Trans-Elect also encouraged the commission to set forth the criteria for CREZ TSP selection.

Trans-Elect stated that TSPs actively serving transmission customers either inside or outside of ERCOT should only need to make a cursory showing of their technical, operational, managerial, and construction expertise, and all parties should be required to make the same showing of financial capabilities. Luminant and STEC recommended that the process to designate a TSP as a qualified TSP be clarified as whether it should be done in a contested case or otherwise.

Commission Response

Subsection (e) of the adopted rule lists the minimum factors that the commission will consider in selecting an entity for a CTP Facility. However, the factors are not exclusive, because the commission and parties to the selection proceedings should have flexibility to consider all relevant factors, especially because the rule creates a new selection process. Nevertheless, the overall objective of the selection process is prescribed by PURA and referred to in the rule: to deliver electricity from the CREZs in a manner that is most beneficial and cost-effective to customers. The type of proceeding that will be used for selection can be addressed in the proceeding itself.

Subsection (d)(2)

E.ON/Iberdrola stated that TSPs should be allowed to propose specific projects instead of requiring the commission to undertake such a compilation.

Commission Response

The rule permits entities to propose specific projects.

Subsection (d)(3)

CenterPoint stated that this subsection should be relocated to subsection (d) "Designation of CTP Projects" to alter the timing of the proposed process so that the commission would designate the CTP projects prior to TSPs being required to select projects that are of interest to the TSP.

Commission Response

The commission agrees that the CTP Facilities should be identified before Interested TSPs are required to submit CTP Proposals. The commission will identify the CTP Facilities in the CREZ docket before Interested TSPs are required to submit CTP Proposals.

LCRA stated that the separation of a CTP Project into distinct CTP Facilities would result in the filing of multiple CCN applications for each facility within a project and would result in increased costs for Interested TSPs and further strain the commission's resources. STEC recommended that only one CCN application be required for a particular CTP project even if it means a joint application in order to more effectively utilized staff resources and to have one in-service date for a joint project.

Commission Response

The rule provides flexibility for the commission to identify the scope of CCN applications in the selection proceedings. Also, the commission may choose in those proceedings to give the Designated TSPs discretion in determining which CTP Facilities to include in particular CCN applications.

Sharyland stated that the selection process should incorporate a specific requirement that the parties participate in a mandatory settlement conference at an early stage of the proceeding. If agreement is not reached or a non-unanimous settlement is reached and a contested proceeding is necessary, the commission should utilize expedited procedures including a hearing before the commission.

Commission Response

The rule provides flexibility for the commission to process the selection proceedings in the most appropriate way given whatever issues actually arise in those proceedings, and targets decisions within 180 days of the filing of the CTP Proposals.

Subsection (d)(4)

E.ON/Iberdrola stated that uncontested CREZ designation proposals should receive prompt disposition and settlement discussions should be encouraged in contested cases.

Commission Response

The rule permits prompt disposition of uncontested CTP Proposals and the encouragement of settlement discussions.

CenterPoint recommended that in authorizing Qualified TSPs to construct, operate, and maintain a CTP Facility, the commission should not split the project after cost estimates have been made, because doing so would render the initial estimates invalid. Also, a divided project would cause coordination problems.

Commission Response

The commission can address these issues in the selection proceedings.

TIEC stated that the rule should have objective criteria to distinguish between providers in order to make the final selection. Also, TIEC stated that the rule should indicate that the lowest-cost option among competing TSPs would be selected.

Commission Response

As stated previously, subsection (e) of the adopted rule lists the minimum factors that the commission will consider in selecting an entity for a CTP Facility. However, the factors are not exclusive, because the commission and parties to the selection proceedings should have flexibility to consider all relevant factors, especially because the rule creates a new selection process. Nevertheless, the overall objective of the selection process is prescribed by PURA and referred to in the rule: to deliver electricity from the CREZs in a manner that is most beneficial and cost-effective to customers.

Subsection (e)

LCRA and Oncor stated that qualification standards should apply only to entrants into the TSP market who do not own and operate transmission facilities in Texas.

Commission Response

As previously stated, the commission has changed the rule to eliminate the separate qualification process, so that qualifications are instead considered in the process for selection of Designated TSPs. Also as previously stated, the commission agrees that a transmission utility already operating in Texas has adequate financial resources to qualify to submit a CTP Proposal, and has changed the rule accordingly.

Lone Star stated that the rule did not make clear that meeting the standards set forth in subsection (e)(1) - (4) will satisfy an Interested TSP's burden of proof and whether these standards are a uniform minimum for all Interested TSPs or whether the standards vary based on the type of CTP Facilities.

Commission Response

As previously stated, subsection (e) of the adopted rule lists the minimum factors that the commission will consider in selecting an entity for a CTP Facility. However, the factors are not exclusive, because the commission and parties to the selection proceedings should have flexibility to consider all relevant factors, especially because the rule creates a new selection process.

Lone Star questioned why the Designated TSP only needed to meet the qualification requirements until the date it places facilities in service. Lone Star stated that the rule should require a

"Qualified TSP" to continue to meet these requirements and that it may lose its qualified status if it does not continue to meet the requirements. Also, it is unclear why an "Interested TSP" would need to continue to meet the requirements to the extent that it does not become Qualified.

Commission Response

The commission believes that the qualification requirements should apply during selection of a Designated TSP, preparation of a CCN application, and construction of the CTP Facility. The rule has been changed accordingly.

Subsection (e)(1)

Lone Star sought clarification for the requirement that every Qualified TSP must establish the financial requirement expected of a Designated TSP for a specific CTP Facility, which has not been identified at the qualifying stage. The commission should only require an Interested TSP to demonstrate that it possesses some minimum level of financial resources.

Commission Response

The commission agrees and has eliminated the qualification stage, so that the Interested TSP will know the CTP Facilities for which it may submit a CTP Proposal. The financial requirements allow for several ways to qualify and for innovative methods of financing CTP Proposals.

Subsection (e)(2)

ERCOT and Lone Star proposed changes to the demonstration of technical and managerial resources to manage the projects. ERCOT encouraged the commission to take into consideration the full range of TSP obligations under the ERCOT Protocols and Operating Guide, TSP-ERCOT Standard Form Agreement, and ERCOT's Transmission Planning Charter. Lone Star stated that the requirement for an Interested TSP to show that it can comply with "all scheduling and operating requirements for the transmission system," if read literally, imposes an excessive burden. The rule should instead require that an Interested TSP must establish that it can comply with all operating requirements for facilities under its control.

Commission Response

The commission agrees and has made changes accordingly.

LCRA and Lone Star had recommendations concerning management experience. LCRA stated that the capability to manage projects should be limited to the executive in charge and his or her direct reports, where the Interested TSP has provided continuous and reliable transmission service in ERCOT. Lone Star stated that the rule should allow entities that meet a threshold to apply to build any CTP Facility. The determination of sufficient experience to build any particular facility would be determined when the commission evaluates the applications.

Commission Response

The rule does not require any particular experience to be selected, but does require that an Interested TSP provide resumes for key management personnel that will be involved in obtaining a transmission CCN and constructing, operating, and maintaining each CTP Facility.

Subsection (e)(3)

CenterPoint, ITC, LCRA, Lone Star, and Oncor proposed clarifications on information about business practices. CenterPoint stated information should be required for only those Interested TSPs that have not provided transmission service in Texas for a minimum of the past 10 years. LCRA and Oncor stated that the complaint history should be limited to the entity's complaint history related to the construction and operation of transmission facilities and the provision of transmission and transmission-related services. For an entrant that does not have a track record providing transmission services in Texas, LCRA stated that information about non-transmission operations and services might be relevant. Lone Star stated that there was a need for a clarification between this subsection that applies to "CTP Facilities" and the previous subsection where the requirement applies to "relevant CTP Facilities." Lone Star stated that the history information involving transmission operations should be on a "normalized" basis, such as complaints per 1,000 customers. Oncor and Lone Star questioned what is meant by an entity's "compliance record" and the term "principals," respectively. ITC recommended clarification of the standard and how it should be satisfied so it is not so ambiguous.

Commission Response

The adopted rule requires a summary of law violations by the Interested TSP found by federal regulatory agencies, state public utility commissions, attorneys general, or other regulatory agencies for the current calendar year and the previous five calendar years. For an entrant, it is difficult to write a rule that obtains relevant information about law violations of its owners and affiliates without being overly broad. The commission expects that parties in the selection proceeding will obtain relevant information about law violations of entrants through public sources and discovery, without overly burdensome discovery requests.

Subsection (e)(4)

Lone Star recommended that the commission require an officer or director or similar managerial figure to submit the required affidavit.

Commission Response

The commission has changed the rule to require that the affidavit be submitted by an officer of the Interested TSP.

Subsection (f)

Lone Star stated that comparing proposals using the cost of construction is not a practical basis for differentiating among TSPs because most of the TSPs will be using the same contractors for these projects, so cost differentiations will be very small. Oncor stated that the rule places too much reliance on the credibility of cost estimates too early in the process. Sharyland stated that Return on Equity (ROE) is a more acceptable and effective way to compare proposals, and ITC suggested a holistic life-cycle evaluation verses a low bid cost selection process.

Commission Response

The commission concludes that comparing the costs of representative structures for a particular conductor size will provide a meaningful measure of the differences among TSPs that seek to construct a CTP Facility. The cost and type of structures and conductors, proposed financing costs, and the overhead for managing the projects are key factors to consider in selecting TSPs for the CTP Facilities. However, the commission recognizes that it must consider the subjectivity of the estimates.

Subsection (f)(1)

ITC stated that there is no indication of how long a Qualified TSP may have to study the CTP Facilities before submitting the

required information. This information would depend upon the exact location of the line, which is not known at this time.

Commission Response

The commission will establish deadlines for submission of CTP Proposals in the selection proceedings. There are competing interests with regard to the time for submitting CTP Proposals: the commission's interest in completing the CREZ Facilities as quickly as possible and the need to allow TSPs adequate time to prepare clear, coherent CTP Proposals.

LCRA stated that it is premature to require information about the proposed structure types because this information is not determined until after more information is obtained about the project.

Commission Response

The commission disagrees but recognizes that changes may occur as the Designated TSP conducts more detailed analyses.

CenterPoint and LCRA stated that the dates for project phases and the in-service date are hard to predict and the intermediary dates are irrelevant.

Commission Response

The commission has eliminated the intermediary dates, because they are not necessarily a realistic predictor of when a project will be completed. However, providing an in-service date appropriately puts the Interested TSP through the process of adequately evaluating construction of each CTP Facility.

LCRA sought clarification of whether estimated costs include indirect costs and whether all cost estimates should be in current year dollars or future year dollars.

Commission Response

The costs should only be direct costs in current dollars.

Sharyland stated that there is no need for TSPs to develop their own cost estimates, especially in light of the fact that all TSPs will utilize substantially the same contractors to construct the facilities and will incur similar construction costs. The only information that the commission should require is: (a) the TSP's financing plan; (b) the TSP's cost of capital; (c) how the TSP plans to manage the construction and operation of the facilities; and (d) the TSP's proposed schedule for the project.

Commission Response

The commission disagrees. Interested TSPs will have different approaches and costs, and may have vendor relationships that could potentially lower costs.

Oncor stated that the rule should be modified to clarify that the reference to structures should apply to "representative" structures and not "every" structure, and stated that this subparagraph should be consistent with what is requested in any incentive plan in the rule.

Commission Response

The adopted rule requires a general description of the proposed structure types for each CTP Facility transmission line, which addresses Oncor's comment.

CenterPoint and LCRA stated that any reference to actual operating and maintenance cost be deleted because of the considerable variability of these among utilities, and LCRA suggested that a prospective cost may be more reasonable.

Commission Response

The commission concludes that having TSPs provide both actual operating and maintenance costs, if available, and an estimate of the cost of operating and maintaining the CTP Facilities will facilitate the selection of TSPs.

LCRA stated in reference to resumes for all executives, managerial, and supervisory personnel that resumes only be filed for TSP's executive in charge and his direct reports.

Commission Response

The adopted rule requires that an Interested TSP provide resumes for key management personnel that will be involved in obtaining a transmission CCN and constructing, operating, and maintaining each CTP Facility. The commission agrees that it is not necessary to have resumes for all management.

Oncor stated that the phrase "preexisting procedures" may not capture each entity's relevant experience and expertise, and the phrase "and historic practices" should be added.

Commission Response

The commission agrees that "preexisting procedures" may not capture the complete range of possibilities and has added the phrase "and historical practices" to subsection (e).

Subsection (f)(1)(K)

Oncor stated that the requirement to identify and quantify "all available capital resources" seems unnecessary for TSPs in general as long as an entity can show that sufficient resources are available, and unnecessary for Oncor in particular as it has successfully certificated and constructed large transmission projects in the past. Also, Oncor also stated that much of the information in clause (ii) would be confidential and highly sensitive information, resulting in an increased administrative burden.

CenterPoint stated that, in general, the demonstration of financial capability should be limited to those projects in which the TSP is interested in participating. CenterPoint also recommended that the requirement for the TSP only identify capital resources that it "expects" to be available and to delete the second requirement for the TSP to identify and quantify the financial impact on the "value, credit rating, and liquidity position" of the company. CenterPoint stated that lending institutions will not irrevocably commit the necessary funds to such projects where important elements of the projects are unknown or uncertain. Therefore, the TSP can only anticipate what will be available. CenterPoint also requested that the second provision related to financial plans be deleted. CenterPoint stated that the information requested can be reasonably determined from the information that will be provided in response to subsection (f)(2); therefore, the requirement in subsection (f)(1)(K)(ii) is unnecessary. In addition, CenterPoint stated that strict compliance with elements of the rule would be impossible because value must be determined by the financial market and no one can say with a degree of certainty how the financial market will value something in the future. If this part of the rule is not deleted, CenterPoint requested that any projections be strictly limited to the cash flows of the project.

Sharyland stated that the appropriate basis for distinguishing between various TSPs is to use the cost of capital that a TSP is willing to accept to construct a project, and the other financial standards of the rule should not be utilized. Sharyland stated that this would open up the selection process to the broadest range of proposals.

LCRA stated that a singular cost of capital and ROE criterion advocated by Sharyland is overly restrictive and confining and this could deny the commission flexibility in selecting TSPs. Similarly, E.ON/Iberdrola, Oncor, and the Texas Farm Bureau stated that the rule should avoid making the TSP's proposed return the sole or principal basis for designation.

ITC stated that the proper analysis should be based on a holistic "life-cycle" analysis in which offsetting savings may make up for a higher ROE and that focusing solely on ROE would lead to gaming of the process, in which the winning TSP would try to gain back the "missing" ROE it had sacrificed by inflating rate base or operations and maintenance expenses.

AEP/ETT stated that the commission should consider the approval of rate of return adders for use of advanced technology that lowers costs or improves service.

Lone Star stated its support for the financial plan requirement to ensure that a TSP has the appropriate financial resources.

Commission Response

The commission agrees with Oncor that the required financial information should not be overly broad and place undue burdens on an Interested TSP. On the other hand, the required information should be sufficient to demonstrate that an Interested TSP has the capability to finance its CTP Proposal while not having adverse impacts on its credit profiles or financial position. Moreover, the commission believes the rule should expressly state that the commission will evaluate the terms of a TSP's financial plan such as fixed versus floating rate financing and the short-term and long-term maturities of the proposed financing instruments, along with a TSP's willingness and ability to implement the plan over a long term time horizon. Accordingly, the commission has replaced the language of proposed subparagraph (K) with Oncor's suggested language in the context of a TSP's financial plan, and added language that identifies the commission's objective of evaluating the financing terms that will be a component of a financial plan.

The commission disagrees with CenterPoint that the language concerning the financial plan should identify capital resources that are anticipated to be available, in contrast to just being available. The commission appreciates that financial plans can be subject to change and that plan uncertainties will vary among Interested TSPs, but it does not believe there is a need to explicitly limit the demonstration of capital resources to anticipated resources. The commission further disagrees with CenterPoint that clause (ii) of proposed subparagraph (K) should be deleted because the information can be determined from information provided in proposed subsection (f)(2). Proposed subsection (f)(2) was established for Interested TSPs to demonstrate that their current financial profiles qualify them for selection to build CTP Facilities using historical metrics, or that they possess an investment grade credit rating based on historical operations. However, the metrics, in all likelihood, would have less predictive efficacy in the context of implementing large construction projects in the CREZ Transmission Plan. Therefore, the financial information required by clause (ii) of proposed subparagraph (K) complements and updates the information required by proposed subsection (f)(2) in the context of CTP Proposals. The commission agrees with CenterPoint that the use of the term "value" in proposed subparagraph (K) clause (ii) is ambiguous and has deleted it.

The commission believes that the selection of a TSP should rest on a number of relevant factors. The commission agrees with E.ON/Iberdrola, ITC, LCRA, and the Texas Farm Bureau that cost of capital should not be the sole criterion in selecting TSPs and has therefore not made Sharyland's proposed changes.

Concerning AEP/ETT's comments, the commission will consider the proposed use of advanced technology that lowers costs or improves service as part of the selection process.

Subsection (f)(2)

Sharyland stated that the requirements that TSPs must maintain an investment grade credit rating and meet specific minimum equity requirements are unnecessary, unduly restrictive, and should be eliminated. Sharyland stated that as drafted, the financial criteria assume that CTP Facilities will be financed by publicly-held companies through traditional utility financing vehicles which in effect limits the universe of TSPs eligible to participate in the selection process to large, investor-owned utilities and would exclude entities that are organized differently, may not have credit ratings, or would finance transmission with capital from sources not generally used by publicly held utilities. Sharyland stated that the commission should not preclude itself from considering proposals from Interested TSPs that can demonstrate alternative methods for financing transmission investment, especially for entities that already hold CCNs in Texas and have successfully constructed major transmission projects in the past. As an alternative to the detailed financial criteria set forth in the proposed rule, Sharyland recommended that the rule simply provide that TSPs submitting proposals to construct CREZ projects must demonstrate that they have the capability to finance the facilities that they seek to construct and provide detailed descriptions of their financing plans, as set forth in proposed subsection (f)(1)(K).

Sharyland further stated that the absence of a credit rating does not indicate a lack of financial capability to fund major transmission projects. Sharyland also stated that the commission should encourage proposals from a wide variety of entities, including those that propose financing arrangements that differ from conventional publicly held utility financing methods, in order to assure that the commission has chosen the most cost-effective transmission solution. In addition, Sharyland stated that opening the selection process to other types of financing proposals offers the potential for a lower cost of capital to electric customers.

STEC stated that the financial requirements for a Qualified TSP unreasonably discriminate against electric cooperatives. Regarding the financial metrics delineated in the proposed rule such as the required minimum amount of tangible assets in excess of liabilities, STEC stated that electric cooperatives are non-profit organizations (subject to state and federal regulations) that return any profit they make to their members and the commission has never allowed cooperatives a return sufficient to support a business that meets the financial criteria of the proposed rule. Therefore, STEC stated that cooperatives should be exempt from these requirements so long as they maintain an investment grade rating.

Lone Star stated that the commission should adopt high standards for the selection of TSPs, and it should reject Oncor's suggestion that a mere investment grade credit rating should meet all financial resource requirements.

CenterPoint stated that the commission should change proposed subsection (f)(2)(A)(i) to make it clear that the definition of tangible assets includes regulatory assets created through the regulatory process. CenterPoint also stated that proposed subsection (f)(2)(A)(ii) should be changed to adjust the mini-

mum financial ratios by excluding the non-recourse transition bonds of subsidiaries, issued pursuant to financing orders of the commission, because the most recently available financial statements of a TSP would likely include those of its consolidated subsidiaries. CenterPoint identified a typographical error in proposed subsection (f)(2)(A)(ii)(II). The proposed rule references "funds from operations-to-total debt of 10x." The ratio should be 10%. CenterPoint further stated that the requirement contained in proposed subsection (f)(2)(B) should be deleted. That is, the term "secure" is not defined and lacks specificity on the standard that must be met in order to comply with the provision. CenterPoint stated that if the subparagraph is not deleted, TSPs should not be limited to the options listed in the proposed rule because TSPs might have the opportunity to implement other financing methods that could lower costs.

Lone Star requested that the commission reject CenterPoint's request to delete subsection (f)(2)(B), because the subsection helps assure that TSPs will have sufficient financial resources to fully perform their obligations.

LCRA stated that this provision should be clarified to indicate whether this "initial cost" refers to the phrase "cumulative total cost" as used in proposed subsection (g)(1)(A), or whether it is a reference to the costs associated with obtaining the CCN at the "initial" phase of a project.

Oncor recommended changes in proposed subsection (f)(2)(A) that it believed would provide adequate assurance of financial resources to the commission. Specifically, proposed clauses (i) and (ii) should be changed to subparagraphs (B) and (C) and connected with "and" instead of "or." Also according to Oncor, proposed subparagraph (A) should be one option and subparagraphs (B) and (C) should be the other. Oncor further recommended that the reference to financial commitment letter be deleted from proposed subsection (f)(2)(B) because such a commitment between a borrower and a lender would be premature prior to the awarding of a project. Oncor also stated that "financing mechanism" is a more appropriate term of art than "financing vehicle" in this provision. Oncor further recommended truncating the language related to the establishment of an investment-grade credit rating and providing for a five-year limitation on information required related to financial problems such as bankruptcy.

ITC stated that the financial criteria should be consistent with accounting statement terminology and the exact formula for calculation should be stated clearly, so that the calculations can be readily made using clearly defined data from financial statements such as a Securities and Exchange Commission (SEC) Form 10-K. ITC offered specific recommendations to clarify and remove any ambiguous language that defines the financial terms. More importantly, according to ITC, any financial resources criteria must also be consistent with the commission's pronouncements that it welcomes entrants into the transmission utility arena. ITC stated that proposed subsection (f)(2)(A)'s criteria would exclude entrants like itself even though ITC is an investment grade company with annual operating revenues over $200 million and total assets over $2 billion as of December 31, 2006. Thus, ITC stated that any criteria used should be adjusted so as not to exclude entrants who are otherwise financially healthy companies.

Oncor stated that the phrase "financial institutions" does not appear to be appropriate in the second sentence of this subpart. Similarly, it does not appear that the word "financial" is appropriate for use in the third sentence of proposed subsection (f)(2)(C).

STEC recommended that proposed subsection (f)(2)(D) not be required of cooperatives, because proposed subsection (d)(7) does not apply to municipal utilities or electric cooperatives.

CenterPoint stated that the requirement in proposed subsection (f)(2)(E) to provide information concerning history of bankruptcy, dissolution, merger, or acquisition should be limited to the past ten years because events that have occurred in the distant past are not relevant. Similarly, Oncor stated that the requested information should be limited to some reasonable time such as the previous five years.

Commission Response

The commission disagrees with Sharyland that financial qualifications should be solely determined through an analysis of an Interested TSP's financial plan for its CTP Proposal, and in particular, the cost of capital or return on equity an Interested TSP proposes. Instead, the commission believes an Interested TSP's creditworthiness should be considered initially, as well as in the context of how it may be financially affected by its CTP Proposal. The commission is cognizant of the various financial characteristics of possible Interested TSPs and does not wish to raise the financial standards to a level that would qualify only financially elite TSPs. As previously stated, the commission agrees that a utility already operating transmission facilities in Texas has adequate financial resources to qualify to submit a CTP Proposal, and has changed the rule accordingly. On the other hand, holding a Texas CCN without operating transmission facilities in Texas or operating as an electric utility outside of Texas does not necessarily provide evidence of these resources. However, the commission has changed the rule to permit an Interested TSP to provide evidence satisfactory to the commission that it has adequate financial resources, which will permit non-traditional entities that may have non-traditional but adequate methods of financing to make a CTP Proposal.

The commission agrees with STEC that an investment grade credit rating alone is sufficient, but that providing alternative financial metrics for those Interested TSPs that do not have credit ratings is appropriate as well. Oncor's recommended changes to the rule encompass this conclusion and the commission has revised the financial qualification standards to reflect this approach. The commission has also added definitions for the components of the required financial ratios and language that would allow it to consider qualifying an Interested TSP that had recently included a large capital asset addition or encountered some other non-recurring event that could temporarily negatively affect its ratios, but be favorable to ratepayers and an Interested TSP over the long term.

The commission has also considered comments regarding the language in proposed subsection (f)(2)(A) and has incorporated many of the clarifying suggestions. The commission disagrees with Lone Star and agrees with CenterPoint that proposed subsection (f)(2)(B) should be deleted and not just changed as LCRA and Oncor suggested, because this requirement is addressed in subsection (e)(1)(N)(ii) of the adopted rule.

Regarding STEC's comment that proposed subsection (f)(2)(D) should not be required of cooperatives because subsection (d)(7) does not apply to municipal utilities or electric cooperatives, the commission agrees and has included STEC's proposed change. The commission also agrees with Oncor that subsection (f)(2)(E), which requires Interested TSPs to provide information concerning history of bankruptcy, dissolution, merger, or acquisition be limited to the current calendar year

and the past five calendar years, because events that have occurred earlier likely will have little relevance to an Interested TSP's current financial condition.

Subsection (f)(3)

Brazos identified various problems that it stated could occur if an entity other than the owner of the existing transmission facility upgrades the facility.

Commission Response

The commission can consider the concerns raised by Brazos when determining who should upgrade a facility.

Subsection (g)

ITC recommended that the rule be clarified to distinguish between TSPs within ERCOT and those that are non-ERCOT.

Commission Response

The commission has concluded in Docket Number 33672 that the initial CREZ transmission facilities will deliver energy to ERCOT. In the future, however, the CREZ process may be used for areas outside of ERCOT, and this rule could be used to select TSPs for the necessary transmission facilities. For this reason, the commission declines to make the change recommended by ITC.

Lone Star stated that the rule is not consistent throughout in regards to the requirements for the cost and schedule of a project.

Commission Response

The commission has reviewed the rule for consistency and has made changes where appropriate.

Lone Star stated that the commission should clarify that adequacy of existing service and need for new service be specifically excluded from the CTP Proposal.

Commission Response

This change is unnecessary because CTP Facilities are facilities that the commission has determined are needed.

Subsection (g)(1)

CenterPoint, LCRA, Lone Star, and Oncor had comments about providing cost estimates when a Designated TSP files its CCN application. They stated that costs would still be very preliminary and should be subject to updating because the final route would not be identified. Oncor stated that cost estimates should not be required every three months and that the cost approval process should be defined.

Commission Response

The commission agrees that cost estimates when the CCN application is filed are preliminary but concludes that these estimates are needed by the commission to track the progress of project implementation. Quarterly cost estimates are excessive and that provision in the rule has been deleted.

CenterPoint, LCRA, and Oncor recommended changes to the milestones on the development schedule for a CTP Facility. CenterPoint and LCRA stated that the requirements to predict percent complete on a three month interval is unnecessarily burdensome. LCRA stated that engineering and design could be scheduled, based on 30, 60, 90, and 100 percent complete which are intervals typically used in construction contracts. Also, right-of-way and land acquisition, material and equipment, and construction will probably be concurrent activities and may require a unique set of milestones for each CTP project. CenterPoint recommended that annual reports and not reports every three months be required and stated that the schedule should be consistent with the information concerning schedules described in the CCN application.

Commission Response

The commission has reduced the cost and schedule reporting requirements to lessen the burden on a Designated TSP while maintaining an adequate amount of information to track the progress of TSP Facility implementation.

Subsection (g)(2)

ITC and LCRA stated that the bond would be a costly regulatory and financial burden. LCRA stated that its contractors require performance bonds, so it should not be required to post an additional bond. CenterPoint, ITC, LCRA, Lone Star, and Oncor requested clarification of various issues. TIEC stated that the performance bond is inadequate to ensure performance and recommended that a performance bond in the amount of 100% of the reasonable cost of the CTP Facility be required.

Commission Response

The commission has eliminated the provisions concerning a performance bond, because the bond is unnecessary in light of the other means the commission has to ensure performance.

Subsection (g)(3)

CenterPoint and LCRA stated that the three-month reporting requirement should either be deleted, with the information being provided in the monthly transmission construction reports, or provided annually.

Commission Response

The commission concludes that the three-month reporting requirement should be changed to an annual requirement because the more frequent reporting does not enhance the oversight of project development. Annual reporting is sufficient considering the existing requirement to provide information in the monthly transmission construction report and the rule's requirement that a change in the implementation schedule that is greater than 60 days must be reported to the commission within 30 days of the change.

Subsection (g)(4)

CenterPoint stated that the difference in estimated and actual costs should be limited to 10%, instead of the proposed 5%. LCRA stated that it is difficult to accurately estimate a land acquisition schedule, and there is dubious value in attempting to estimate benchmarks against which a TSP's performance will be measured especially as they relate to the three month milestones.

Commission Response

The commission concludes that the schedule deviation reporting requirement is too detailed and has changed it to require deviations to the in-service date. Delays in any particular phase of a project are not necessarily an accurate indication that the project will not meet its in-service date. Projects can be accelerated in certain areas to overcome delays in other areas.

Subsection (g)(5)

CenterPoint, ITC, LCRA, and Oncor recommended that the commission delete the portion of the proposed rule that states the

commission can revoke a CCN. They argued that the commission lacks the statutory authority to adopt the ability to revoke a certificate. Also, the adoption of this policy would create regulatory uncertainty. STEC submitted that the revocation provision should only occur after a contested case so that a record is available that would allow the TSP to seek judicial review.

Commission Response

The adopted rule provides that the commission may revoke a CCN if the commission determines that the Designated TSP has failed to comply with the CCN order for the CTP Facility. Each CTP Facility is an integral part of a plan to transport renewable energy from CREZs to customers. The failure to complete a CTP Facility may jeopardize the effectiveness and reliability of the overall plan. Therefore, the commission concludes that it is appropriate to expressly state in the rule a method to deal with the possibility that a Designated TSP will not comply with a CCN order concerning a CTP Facility. PURA §37.059 provides the commission the authority to revoke a CCN in the circumstance addressed by the rule, because in that circumstance the Designated TSP will have failed to provide service as required by the CCN order, which as the commission has described, may jeopardize the effectiveness of the CREZ Transmission Plan.

Subsection (h)

E.ON/Iberdrola, LCRA, Luminant, Oncor, Sharyland, and TIEC recommended that the performance incentives not be adopted in this rulemaking. A number of issues were raised concerning performance incentives, including their legality, difficulty in implementation, potential for delays and increased costs in the CREZ process, changing rates in advance of a rate case, effectiveness of the incentives, multiple ROEs for transmission assets, discouraging participants, and creation of bias toward overestimating the costs and timing of projects. LCRA recommended that the performance incentives on projects apply to projects for which the Designated TSP is selected through the competitive solicitation process and would not apply if the existing owner is performing an upgrade or the commission makes a direct designation of the Designated TSP. If this provision remains in the rule, then LCRA recommended that a TSP be allowed to except from the application of any of the incentive mechanisms.

ITC stated that the incentive program would not be applicable to non-ERCOT region because of FERC regulation over transmission rates. LCRA argued that as a non-profit, it is not able to accept a penalty because it has no "profit."

Lone Star recommended that the forecasted costs that comprise the performance plan be deemed prudent in a rate proceeding.

Commission Response

The commission has removed the performance incentives from the rule because it has other means of ensuring performance and because given the novelty of the TSP selection process addressed by the rule, it is best to avoid at this time unnecessary issues concerning performance incentives.

Subsection (i)

LCRA recommended that the Designated TSP not have to file testimony at the time the application is filed because this is not a requirement for any "non-critical" transmission project and is unnecessarily inefficient and unduly burdensome.

Lone Star stated that filing forms should be established for use in the Qualified TSP and Designated TSP applications.

Oncor stated that the word "direct" should be inserted before "testimony" in subsection (i).

Commission Response

The commission concludes that the filing of direct testimony with the application will appropriately expedite the certification phase of the implementation of the CTP Facilities. The commission further concludes that the requirements outlined in the rule are of sufficient detail for CTP Proposals, and therefore a form is not needed.

Subsection (j)

Lone Star assumed that the proceeding described in subsection (j) would be a contested case.

Commission Response

The type of proceeding that will be used for selection of Designated TSPs can be addressed in the proceeding itself.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this new section, the commission has made modifications to the section for the purpose of clarifying its intent.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 & Supp. 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §35.005, which grants the commission authority to order transmission service and construction or enlargement of facilities; PURA §37.051, which requires in part that electric utilities obtain a certificate of convenience and necessity (CCN) from the commission prior to providing service to the public; PURA §37.056, which establishes conditions under which the commission may grant or deny a CCN; PURA §37.059, which provides the commission the authority to revoke a CCN for failure to provide service; PURA §39.203(e), which in part directs the commission to require an electric utility or a transmission and distribution utility to construct or enlarge transmission or transmission-related facilities for the purpose of meeting the goal for generating capacity from renewable energy technologies under PURA §39.904(a); and specifically, PURA §39.904, which requires the commission to develop a plan to construct transmission capacity necessary to deliver to electric customers, in a manner that is most beneficial and cost-effective to the customers, the electric output from renewable energy technologies in the competitive renewable energy zones.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 35.005, 37.051, 37.056, 37.059, 39.203(e), and 39.904.

§25.216. Selection of Transmission Service Providers.

(a) Application. This section applies to any transmission service provider (TSP), or entity seeking to become a TSP, that submits an application to construct, operate, and maintain one or more competitive renewable energy zone (CREZ) Transmission Plan (CTP) Facilities.

(b) Purpose. The purpose of this section is to state the requirements that govern the selection and performance of one or more TSPs, or entities seeking to become TSPs, that will be responsible for the construction, operation, and maintenance of CTP Facilities.

(c) Definitions. The following words and terms when used in this section have the following meaning unless the context indicates otherwise:

(1) CREZ Transmission Plan (CTP)--The transmission capacity plan required by §25.174(c)(2) of this title (relating to Competitive Renewable Energy Zones).

(2) CTP Facility--A transmission line with or without a substation or any other transmission facility as identified in the CTP and designated by the commission.

(3) CTP Proposal--An application to serve as a Designated TSP for one or more CTP Facilities that is submitted by an Interested TSP.

(4) Designated TSP--An Interested TSP that the commission has designated to construct, operate, and maintain one or more CTP Facilities.

(5) Interested TSP--An entity seeking status as a Designated TSP that meets the definition of a TSP as defined by §25.5(143) of this title (relating to Definitions) or that commits to meeting such definition as necessary to fulfill its obligations as a Designated TSP.

(6) Funds from operations--Net income from continuing operations, depreciation and amortization, deferred income taxes, and other non-cash items.

(7) Total debt--Long-term debt, current maturities, commercial paper, and other short-term borrowings.

(8) Historically underutilized business--Defined by Texas Government Code §481.191, as it may be amended.

(9) Interest--Gross interest without subtracting capitalized interest and interest income.

(d) Selection process. The following steps outline the process the commission will employ to select Designated TSPs.

(1) The commission will initiate a proceeding that will invite each Interested TSP to file a CTP Proposal. The presiding officer shall set a procedural schedule that will enable the commission to decide the issues in the proceeding within 180 days after the deadline to file CTP Proposals unless good cause exists for setting a different schedule. The presiding officer may sever issues or CTP Proposals into separate proceedings.

(2) For each existing CTP Facility requiring an upgrade or modification, the commission will select the owner of the facility to be the Designated TSP for the CTP Facility, unless the owner requests that a different Interested TSP be selected or good cause exists to select another transmission service provider.

(3) For each new CTP Facility, the commission will select a Designated TSP pursuant to subsection (e) of this section.

(e) Selection of Designated TSP. The commission will evaluate each CTP Proposal received by considering, at a minimum, the current and expected capabilities of the Interested TSP to finance, license, construct, operate, and maintain the CTP Facility or Facilities in the most beneficial and cost-effective manner and the expertise of the Interested TSP's staff, the Interested TSP's projected capital costs and operating and maintenance costs for each CTP Facility, the Interested TSP's proposed schedule for development and completion of each CTP Facility, the Interested TSP's financial resources, the Interested TSP's expected use of historically underutilized businesses unless the Interested TSP is an electric cooperative or municipally owned utility, and the Interested TSP's understanding of the specific requirements to implement the CTP Facilities in its CTP Proposal and, if applicable, the Interested TSP's previous transmission experience and the Interested TSP's historical operating and maintenance costs for its existing transmission facilities.

(1) Each Interested TSP shall submit with its CTP Proposal the following information:

(A) A description of the process that the Interested TSP will use for the preparation of any required application for a certificate of convenience and necessity (CCN).

(B) For each CTP Facility transmission line, a general description of the proposed structure types (lattice, monopole, etc.) and composition (wood, steel, concrete, hybrid, etc.), conductor size and type, and right-of-way (ROW) width.

(C) The projected in-service date of each CTP Facility.

(D) A discussion of the type of resources, including relevant capability and experience (in-house labor, contractors, other TSPs, etc.) contemplated for use by the Interested TSP for the licensing, design, engineering, material and equipment procurement, ROW and land acquisition, construction, and project management related to the construction of each CTP Facility.

(E) A discussion of the type of resources contemplated by the Interested TSP for operating and maintaining each CTP Facility after it is placed in-service.

(F) A discussion of the capability and experience of the Interested TSP that would enable it to comply with all on-going scheduling, operating, and maintenance activities required for each CTP Facility, including those required by policies, rules, guidelines, and procedures established by the Electric Reliability Council of Texas independent system operator or other independent organization, if applicable.

(G) Resumes for key management personnel that will be involved in obtaining a transmission CCN and constructing, operating, and maintaining each CTP Facility.

(H) A discussion of the Interested TSP's business practices that demonstrates that its business practices are consistent with good utility practices for proper licensing, designing, ROW acquisition, constructing, operating, and maintaining CTP Facilities. The Interested TSP shall also provide the following information for the current calendar year and the five calendar years immediately preceding its filing under subsection (d)(1) of this section.

(i) A summary of law violations by the Interested TSP found by federal regulatory agencies, state public utility commissions, other regulatory agencies, or attorneys general.

(ii) A summary of any instances in which the Interested TSP is currently under investigation or is a defendant in a proceeding involving an attorney general or any state or federal regulatory agency, for violation of any laws, including regulatory requirements.

(I) For each CTP Facility transmission line, the estimated direct costs in current dollars to construct (including design, engineering, materials, labor, transportation and other necessary expenses but excluding ROW and land acquisition) representative tangent, 30-degree, and 90-degree structures suitable for the type of conductor that would be used. The estimated costs shall be provided for each type of structure that might be used such as lattice, monopole, etc.

(J) For each CTP Facility transmission line, a detailed explanation and estimate of the Interested TSP's anticipated average annual operating and maintenance cost-per-mile in current dollars for the line for the first 10 years of operation. Also, the Interested TSP shall provide the actual average direct operating and maintenance cost-per-mile incurred by the Interested TSP for each of the last five calendar years for all transmission lines owned and operated by the Interested TSP that have the same voltage as the CTP Facility transmission line.

(K) The Interested TSP's overhead rate for managing third-parties, if the Interested TSP contemplates the use of third-parties to perform any function related to the licensing, construction, operation, or maintenance of the CTP Facility and the willingness of the Interested TSP to maintain the overhead rate for the managing of the third-party operation and maintenance for a fixed period of time after the CTP Facility has been energized.

(L) The Interested TSP's preexisting procedures and historical practices for acquiring ROW and land and managing ROW and land acquisition for transmission facilities. If the Interested TSP does not have such preexisting procedures, it shall provide a detailed description of its plan for acquiring ROW and land and managing ROW and land acquisition.

(M) The Interested TSP's preexisting procedures and historical practices for mitigating the impact of transmission facilities on affected landowners and for addressing public concerns regarding transmission facilities. If the Interested TSP does not have such preexisting procedures, it shall provide a detailed description of its plan for mitigating the impacts on affected landowners and addressing public concerns regarding CTP Facilities.

(N) A proposed financial plan that confirms that:

(i) adequate capital resources are available to the Interested TSP to allow the Interested TSP to finance the CTP Facilities, and

(ii) no significant negative impact on the creditworthiness or financial condition of the Interested TSP, as demonstrated in paragraph (2)(A) - (D) of this subsection, will occur as a result of the Interested TSP's construction, operation, and maintenance of the CTP Facilities. In evaluating an Interested TSP's financial plan the commission will consider the terms of the proposed financing available to the Interested TSP including variable and fixed cost financing, short-term and long-term maturities and an Interested TSP's willingness and ability to fix the cost of financing for a fixed period of time.

(O) An affidavit by an officer of the Interested TSP stating that the information in the application is true and that the Interested TSP will comply with the applicable rules in this title and with the Public Utility Regulatory Act (PURA).

(P) Other evidence, at the discretion of the Interested TSP, which supports its selection as a Designated TSP.

(Q) Unless the Interested TSP is an electric cooperative or municipally owned utility, a description of the Interested TSP's use of historically underutilized businesses for the last five calendar years and expected use of historically underutilized businesses.

(R) Subparagraphs (A) - (N) of this paragraph do not apply to a CTP Proposal that is supported or unopposed by all parties in the proceeding by the deadline to file the CTP Proposal.

(2) The Interested TSP must establish that it has adequate financial resources as described in subparagraphs (A) - (G) of this paragraph.

(A) The Interested TSP holds a CCN issued by the commission for electric transmission facilities, or the Interested TSP holds a CCN issued by the commission to provide retail electric service and operates electric transmission facilities in Texas;

(B) The Interested TSP or its parent company or controlling shareholder or another company providing a bond guaranty or corporate commitment to the Interested TSP under subparagraph (E) of this paragraph must demonstrate an investment-grade credit rating as defined in subparagraph (E) of this paragraph; or

(C) The Interested TSP must establish that it has:

(i) assets less any goodwill but including regulatory assets in excess of liabilities of at least 40% of the projected total cost of the CTP Facility on its most recent audited financial statements; and

(ii) the following minimum financial ratios, adjusted to exclude transition bonds of subsidiaries, obtained from the Interested TSP's most recent audited financial statements:

(I) funds from operations-to-interest coverage of 1.5x;

(II) funds from operations-to-total debt of 10%; and

(III) total debt-to-total capital no greater than 65%. However, the commission may choose not to require compliance with the minimum financial ratios if the Interested TSP cannot meet them because of non-recurring events that are projected to be favorable to ratepayers and the Interested TSP's long-term operations and financial condition, such as a large asset addition to its rate base.

(D) Notwithstanding subparagraphs (A) - (C) of this paragraph, the commission may determine that an Interested TSP is eligible for selection as a Designated TSP if the Interested TSP provides evidence satisfactory to the commission that it has the capability to finance the proposed CTP Facility it proposes to construct, operate, and maintain.

(E) For an Interested TSP to establish its investment-grade credit rating, it may rely upon its own investment-grade credit rating or a bond, guaranty, or corporate commitment of an investment-grade rated company. The determination of such investment-grade quality will be based on the credit ratings provided by Standard & Poor's (S&P), Moody's Investor Services (Moody's), or any other nationally recognized rating agency. The minimum investment credit ratings that will satisfy the requirements of this paragraph include "BBB-" for S&P, "Baa3" for Moody's, or their financial equivalent. If the relied-upon rating agency suspends or withdraws the investment grade credit rating, the Interested TSP shall provide alternative financial evidence within ten days of such suspension or withdrawal.

(F) To the extent an Interested TSP is an electric utility as defined in PURA §31.002(6) and relies on an affiliated transmission and distribution utility for credit, investment, or other financing arrangements, it shall demonstrate that any such arrangement complies with §25.272(d)(7) of this title (relating to Code of Conduct for Electric Utilities and their Affiliates).

(G) The Interested TSP shall provide a summary of any history of bankruptcy, dissolution, merger, or acquisition of the Interested TSP or any predecessors in interest for the current calendar year and the five calendar years immediately preceding its filing under this subsection (d)(1) of this section.

(f) Performance of Designated TSP.

(1) If the commission determines that a Designated TSP has failed to submit a CCN application in compliance with the order designating it for a CTP Facility, the commission may revoke the designation awarded to it, and select another entity for the CTP Facility.

(2) Within six months of the date the commission grants the CCN for CTP Facilities, the Designated TSP shall, based on the latest available information, file with the commission the following information.

(A) The estimated total cost for each CTP Facility in the following categories:

(i) CCN acquisition;

(ii) ROW and land acquisition;

(iii) engineering and design;

(iv) procurement of material and equipment; and

(v) construction of facilities.

(B) An implementation schedule for each CTP Facility that provides start and completion dates for the following four major functions:

(i) engineering and design;

(ii) ROW and land acquisition;

(iii) material and equipment procurement; and

(iv) construction of facilities. The implementation schedule shall also include the estimated in-service date of the CTP Facilities.

(3) During implementation of each CTP Facility, the Designated TSP shall, within 30 days of becoming aware of any implementation schedule change that is greater than 60 days for the estimated dates provided pursuant to paragraph (2)(B) of this subsection, file with the commission a detailed explanation of the reasons for the change.

(4) If the commission determines that the Designated TSP has failed to comply with the CCN order for the CTP Facility, the commission may revoke the CCN.

(5) Each Designated TSP shall file an updated total cost for each of its CTP Facilities requiring a CCN, one year after CCN approval and annually thereafter until the CTP Facility is placed in-service.

(g) Filing requirements.

(1) Notwithstanding §25.174(c)(4) of this title, the commission may establish and amend a filing schedule for the submission of CCN applications for CTP Facilities.

(2) A Designated TSP shall use the commission form entitled "Application for a Certificate of Convenience and Necessity for a Proposed Transmission Line Pursuant to P.U.C. Subst. R. 25.174" when filing a CCN application for a CTP Facility.

(3) A Designated TSP filing a CCN application for a CTP Facility shall also file all direct testimony in support of the application at the time the application is filed.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 19, 2008.

TRD-200803161
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: July 9, 2008
Proposal publication date: December 21, 2007
For further information, please call: (512) 936-7223

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 105. FOUNDATION SCHOOL PROGRAM

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPTIONAL EXTENDED YEAR PROGRAM

19 TAC §105.1001

The Texas Education Agency (TEA) adopts an amendment to §105.1001, concerning the optional extended year program. The amendment is adopted without changes to the proposed text as published in the April 11, 2008, issue of the *Texas Register* (33 TexReg 2886). Section 105.1001 establishes provisions relating to the administration of the optional extended year program. The adopted amendment updates agency administration of the program and provides minor technical corrections to enhance the understanding of the rule for school districts.

Texas Education Code (TEC), §29.082, Optional Extended Year Program, was added in 1995 by the 74th Texas Legislature and amended in 1997 and 2003 by the 75th and 78th Texas Legislatures, respectively. TEC, §29.082, allows the commissioner of education to adopt rules for the administration of programs provided under this section. In accordance with the TEC, §29.082, a school district may apply to the TEA for funding of an extended year program for a period not to exceed 30 instructional days for students in Kindergarten-Grade 11 who are identified as likely not to be promoted to the next grade level for the succeeding school year or for students in Grade 12 who are identified as likely not to graduate from high school before the beginning of the succeeding school year. The commissioner exercised rulemaking authority to adopt 19 TAC §105.1001, Optional Extended Year Program, to be effective December 1, 1997, and has amended the rule twice to reflect changes to statute and agency administration of the program. The adopted amendment revises the maximum entitlement requirements to increase the amount per-student allocation and adds, revises, or deletes text to reflect minor technical corrections, as follows.

New subsections (b) and (c) clarify the definition of the Optional Extended Year Program and student eligibility requirements. Subsequent subsections have been re-lettered accordingly.

Re-lettered subsection (d)(2) has been modified to reflect the change to the maximum entitlement requirement to serve at least 5.0% of the at-risk population in Kindergarten-Grade 12 rather than 10%. This change in the at-risk requirement will encourage more school districts to apply for funding and will increase the amount per-student funding allocation for school districts statewide.

Re-lettered subsection (d)(4) has been modified to remove the 50% or more economically disadvantaged reallocation formula thus allowing all funded school districts the opportunity to equally receive reallocation funds as available.

Existing subsections (f) and (i) have been deleted because those provisions are addressed in new subsections (b) and (c), respectively. Existing subsections (g) and (j) have been deleted, as these items are no longer necessary requirements for the program, based on feedback from participating districts.

Re-lettered subsection (i) has been revised to provide clarification regarding the required teacher training for the program.

The TEA determined that the adopted amendment will have no direct adverse economic impact for small businesses or

microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began April 11, 2008, and ended May 11, 2008. Following is a summary of the public comments received and corresponding agency responses regarding the proposed amendment to 19 TAC Chapter 105, Foundation School Program, Subchapter AA, Commissioner's Rules Concerning Optional Extended Year Program, §105.1001, Optional Extended Year Program.

Comment. An individual commented that the minimum base amount for the Optional Extended Year Program should be set at $5,500. The individual further commented that students could be offered a great program at that amount.

Agency Response. The agency agrees that students could be better served by increasing the funds per student. The agency, however, disagrees with setting a specific base amount and has maintained language as published as proposed. The amendment may provide a higher award amount per student due to the percentage of at-risk students districts are required to serve decreasing from 10% to 5%. In addition, any funds made available through the reallocation process will automatically be given back to current Optional Extended Year Program grantees without an increase in the number of students they are required to serve, which may also increase the amount per student.

Comment. The assistant superintendent for curriculum and instruction at Hereford Independent School District commented in favor of the change that allows unused funds to be reallocated to more school districts that receive Optional Extended Year Program funding. The assistant superintendent commented that districts with increasing numbers of at-risk students should receive proportionate funding for summer or extended session needs.

Agency Response. The agency agrees and has maintained language as published as proposed. This rule action will provide a higher funding amount per student. Additional funding may also be available even without an increase in number of students served if reallocated funds become available.

The amendment is adopted under the Texas Education Code, §29.082, which authorizes the commissioner of education to adopt rules for the administration of optional extended year programs.

The amendment implements the Texas Education Code, §29.082.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803158
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: July 8, 2008
Proposal publication date: April 11, 2008
For further information, please call: (512) 475-1497

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS
SUBCHAPTER B. ELIGIBILITY FOR REGISTRATION

22 TAC §1.21

The Texas Board of Architectural Examiners adopts an amendment to §1.21 of Chapter 1, Subchapter B, pertaining to registration by examination. The amendment is adopted without changes to the proposed text as published in the April 4, 2008, issue of the *Texas Register* (33 TexReg 2770).

The amendment to §1.21 allows a candidate for registration to seek registration based upon education obtained from an architectural program if the program is granted accreditation candidacy status and becomes accredited within three years after the candidate graduates from the program. The provision allows for the registration of candidates who were students when the program where they were enrolled was undergoing evaluation for accreditation. If the program became accredited based upon conditions and performance at the time the candidate attended the program, the candidate is likely to have received an education equivalent to that from an accredited program. The Board is extending the "look back" provision of the education component of its registration requirements from two to three years because the accreditation review and approval process frequently takes longer than two years.

The agency received no comments concerning the proposed amendment to this rule.

The amendment is adopted pursuant to §1051.202 and §1051.705, Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners with general authority to promulgate rules and discretion to approve the colleges or universities of architecture that provide acceptable education for registration as an architect.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803238
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: July 13, 2008
Proposal publication date: April 4, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

CHAPTER 3. LANDSCAPE ARCHITECTS
SUBCHAPTER B. ELIGIBILITY FOR REGISTRATION

22 TAC §3.21

The Texas Board of Architectural Examiners adopts an amendment to §3.21 of Chapter 3, Subchapter B, pertaining to registration by examination. The amendment is adopted with changes

to the proposed text as published in the April 4, 2008, issue of the *Texas Register* (33 TexReg 2771).

The amendment to §3.21 allows a candidate for registration to seek registration based upon education obtained from a landscape architectural program if the program is granted accreditation candidacy status and becomes accredited within three years after the candidate graduates from the program. The intent of the "look back" provision is to allow for the registration of candidates who were students when the program where they were enrolled was undergoing evaluation for accreditation. If the program became accredited based upon conditions and performance at the time the candidate attended the program, the candidate is likely to have received an education equivalent to that available from an accredited program. The Board is extending the "look back" provision of the education component of its registration requirements from two to three years because the accreditation review and approval process frequently takes longer than two years.

The board made the following changes to §3.21(a)(1)(D) as proposed: the reference to "NAAB" was replaced with "Education Credential Evaluators" as the organization that may evaluate a landscape architectural education program outside the United States as stated in the rule as it is currently written.

The agency received no comments concerning the proposed amendment to this rule.

The amendment is adopted pursuant to §1051.202 and §1052.154(a)(1), Texas Occupations Code Annotated which provide the Texas Board of Architectural Examiners with general authority to promulgate rules and authority to recognize and approve landscape architectural programs which render education acceptable for registration as a landscape architect.

§3.21. Registration by Examination.

(a) In order to obtain landscape architectural registration by examination in Texas, an Applicant:

(1) shall have a professional degree from:

(A) a landscape architectural education program accredited by the Landscape Architectural Accreditation Board (LAAB),

(B) a landscape architectural education program that became accredited by LAAB not later than two years after the Applicant's graduation,

(C) a landscape architectural education program that was granted candidacy status by LAAB and became accredited by LAAB not later than three years after the Applicant's graduation, or

(D) a landscape architectural education program outside the United States where an evaluation by Education Credential Evaluators or another organization acceptable to the Board has concluded that the program is substantially equivalent to an LAAB accredited professional program;

(2) shall successfully demonstrate that he/she has gained at least two (2) years' actual experience working directly under a licensed landscape architect or other experience approved by the Board pursuant to the Texas Table of Equivalents for Experience in Landscape Architecture; and

(3) shall successfully complete the landscape architectural registration examination as more fully described in Subchapter C of this chapter.

(b) An Applicant for landscape architectural registration by examination who commenced his/her landscape architectural education or experience prior to September 1, 1999, shall be subject to the rules and regulations relating to educational and experiential requirements as they existed on August 31, 1999.

(c) For purposes of this section, an Applicant shall be considered to have "commenced" his/her landscape architectural education upon enrollment in an acceptable landscape architectural education program.

(d) In accordance with federal law, the Board must verify proof of legal status in the United States. Each Applicant shall provide evidence of legal status by submitting a certified copy of a United States birth certificate or other documentation that satisfies the requirements of the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. A list of acceptable documents may be obtained by contacting the Board's office.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803239
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: July 13, 2008
Proposal publication date: April 4, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER B. ELIGIBILITY FOR REGISTRATION

22 TAC §5.31

The Texas Board of Architectural Examiners adopts an amendment to §5.31 of Chapter 5, Subchapter B, pertaining to registration by examination. The amendment is adopted without changes to the proposed text as published in the April 4, 2008, issue of the *Texas Register* (33 TexReg 2771).

The amendment allows a candidate for registration to seek registration based upon education obtained from an interior design program if the program is granted accreditation candidacy status and becomes accredited within three years after the candidate graduates from the program. The provision allows for the registration of candidates who were students when the program where they were enrolled was undergoing evaluation for accreditation. If the program became accredited based upon conditions and performance at the time the candidate attended the program, the candidate is likely to have received an education equivalent to that obtained from an accredited program. The Board is extending the "look back" provision of the education component of its registration requirements from two to three years because the accreditation review and approval process frequently takes longer than two years. The amendment also replaces the term "Foundation for Interior Design Education Research (FIDER)" with "Council for Interior Design Accreditation (CIDA)" to reflect the name change made by The Foundation.

The agency received no comments concerning the proposed amendment to this rule.

The amendment is adopted pursuant to §1051.202 and §1053.155(c)(1), Texas Occupations Code Annotated which

provide the Texas Board of Architectural Examiners with general authority to promulgate rules and discretion to recognize and approve interior design educational programs acceptable to gain admission to take the registration examination.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803240
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: July 13, 2008
Proposal publication date: April 4, 2008
For further information, please call: (512) 305-8544

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER T. MINIMUM STANDARDS FOR MEDICARE SUPPLEMENT POLICIES

28 TAC §3.3313

The Commissioner of Insurance adopts an amendment to §3.3313, concerning filing requirements for Medicare supplement insurance advertisements requiring Departmental review. The amendment is adopted without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3550).

REASONED JUSTIFICATION. The Department has determined that institutional advertisements that merely reference Medicare supplement insurance as a line of coverage are routinely accepted by the Department without objections and are not currently a source of false, misleading, or deceptive marketing practices. Therefore, the amendment is necessary to more effectively utilize Departmental resources without compromising consumer protection. Additionally, the adopted amendment will provide more efficient and cost-effective advertising filing requirements for Medicare supplement insurance issuers.

HOW THE SECTION WILL FUNCTION. The adopted amendment to §3.3313 clarifies that an issuer providing Medicare supplement insurance benefits is not required to submit to the Department for review any institutional advertisements that merely reference Medicare supplement insurance as a line of coverage offered by the issuer.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Department did not receive any comments on the proposed amendment.

STATUTORY AUTHORITY. The amendment is adopted pursuant to Insurance Code §§1652.001, 1652.005, 36.003, and 36.001. Section 1652.001 provides that an approved regulatory program for Medicare supplement benefit plans means a state regulatory program that complies with the requirements of 42 U.S.C. 1395ss. Section 1652.005 authorizes the Commissioner of Insurance to adopt reasonable rules necessary and proper to implement Chapter 1652, including rules adopted in accordance with federal law relating to the regulation of Medicare supplement benefit plan coverage necessary for the state to obtain or retain federal certification as a state with an approved regulatory program. Subsection (b)(3) of 42 U.S.C. 1395ss requires review and approval of Medicare supplement advertising material to the extent authorized by state law. Section 36.003 provides that the Commissioner may not adopt rules restricting advertising or competitive bidding by a person regulated by the Department except to prohibit false, misleading, or deceptive practices. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2008.

TRD-200803157
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: July 8, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 463-6327

♦ ♦ ♦

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER E. HEALTH FACILITY FEES

28 TAC §134.401

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division), adopts the repeal of 28 Texas Administrative Code §134.401, concerning the acute care inpatient hospital fee guideline. This repeal is adopted without changes to the proposal as published in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1487) and will not be republished.

The repeal of §134.401 is necessary due to the adoption of §134.403 and §134.404, effective March 1, 2008, which implement Labor Code §413.011 by adopting standardized reimbursement structures using the most current methodologies, models, values and weights used by the Centers for Medicare and Medicaid Services (CMS).

Section 134.401 was adopted in 1997 to implement Labor Code §413.011 and provided for per diem reimbursement and a "stop-loss" provision. The stop-loss provision was intended to com-

pensate for unusually costly services and has generated substantial litigation.

Labor Code §413.011 was amended in 2001 by House Bill (HB) 2600, 77th Legislature, Regular Session. That legislation directed the Division of Workers' Compensation to adopt a reimbursement structure modeled along the lines of the Medicare system. Section 134.401 did not contain a reimbursement structure that met the statutory requirements.

In accordance with the directive of HB 2600, the Division adopted §134.403, concerning Hospital Fee Guideline--Outpatient and §134.404, concerning Hospital Facility Fee Guideline--Inpatient, which superseded the provisions of §134.401 for reimbursements due to admissions on and after March 1, 2008. Section 134.403 and §134.404 implemented Labor Code §413.011 by adopting a standardized reimbursement structure using the most current methodologies, models, values and weights used by the CMS.

With the adoption of §134.403 and §134.404, §134.401 no longer meets the needs of the workers' compensation system for services provided on or after March 1, 2008.

Repeal of §134.401 is also necessary since it does not meet the requirements of Labor Code §413.011 concerning the adoption of a standardized reimbursement structure using the most current methodologies, models, values and weights used by the CMS. While §134.1 does not explicitly provide for a standardized reimbursement structure using the most current methodologies, models, values and weights used by the CMS, it is broad enough to encompass those requirements. Section 134.1(f) states, "Fair and reasonable reimbursement shall: (1) be consistent with the criteria of Labor Code §413.011." Labor Code §413.011(a) requires the Commissioner to "adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements" and to achieve that standardization by adopting the most current reimbursement methodologies, models, and values or weights used by the federal CMS. To properly implement the fair and reasonable standard as set forth in §134.1(f), the requirements from Labor Code §413.011(a) "that most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services" be used, would be incorporated. As a result, using the fair and reasonable standard of §134.1 as the default would more closely conform to the requirements of Labor Code §413.011 than would §134.401.

For this reason, the Division adopts the repeal of §134.401.

New §134.403 and §134.404 will apply to reimbursement based on hospital admissions on or after March 1, 2008. Section 134.401 will continue to apply to reimbursements related to admissions prior to March 1, 2008.

The repeal of §134.401 removes the former §134.401, which covered reimbursements for inpatient hospital fees for services related to admissions prior to March 1, 2008. Reimbursement for services related to admission dates on or after March 1, 2008 will now proceed under the guidelines set forth in §134.403 and §134.404. Section 134.404(a)(2) provides that "{f}or admission dates prior to March 1, 2008, the law and Division of Workers' Compensation (Division) rules in effect for those dates of service shall apply," therefore, the provisions of §134.401 will continue to be applied to services related to admission dates prior to March 1, 2008.

Comment: Several commenters stated that they support the repeal of §134.401 because it did not comply with the requirements of Labor Code §413.011.

Agency Response: The Division appreciates the supportive comment.

Comment: One commenter stated that he opposes the repeal of §134.401 because of the uncertainty of how a repeal will affect pending cases.

Agency response: The Division disagrees that there is any uncertainty and clarifies that §134.401 will continue to apply to reimbursements related to hospital admissions prior to March 1, 2008.

Comment: Several commenters stated that the repeal is unnecessary because HB 7 provided that the prior Texas Workers' Compensation Commission (TWCC) rules would remain in effect until superceded by rules of the Division and the new §134.403 and §134.404 have superceded §134.401.

Agency Response: The Division disagrees that the repeal is unnecessary. As noted in the Reasoned Justification above, §134.401 does not meet the requirements of Labor Code §413.011 concerning the adoption of a standardized reimbursement structure using the most current methodologies, models, values and weights used by the Centers for Medicare and Medicaid Services (CMS). While §134.1 does not explicitly provide for a standardized reimbursement structure using the most current methodologies, models, values and weights used by the CMS, it is broad enough to encompass those requirements and incorporates them in §134.1(f)(1) by stating that they shall be "be consistent with the criteria of Labor Code §413.011." Labor Code §413.011(a) requires the Commissioner to "adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements" and to achieve that standardization by adopting the most current reimbursement methodologies, models, and values or weights used by the federal CMS. To properly implement the fair and reasonable standard as set forth in §134.1(f), the requirements from Labor Code §413.011(a) "that most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services" be used, would be incorporated. As a result, using the fair and reasonable standard as the default would more closely conform to the requirements of Labor Code §413.011 than would §134.401.

Second, while HB 7 did provide that the rules of the former TWCC would remain in effect until superceded by rules of the Division, new §134.403 and §134.404 specifically apply only to cases occurring on or after March 1, 2008 and do not supercede the rules that applied to reimbursements based on admissions prior to March 1, 2008. Indeed, §134.404(a)(2) provides that "{f}or admission dates prior to March 1, 2008, the law and Division of Workers' Compensation (Division) rules in effect for those dates of service shall apply." Section 134.401 is the Division rule in effect prior to March 1, 2008.

Comment: Several commenters asked that the reasoned justification set out in the proposal for the rule repeal be expanded to more fully set forth the Division's reason for the repeal. Specifi-

cally, they suggested that the preamble state that the 1997 rule is not Medicare based and that the 1997 rule does not achieve effective medical cost control.

Agency Response: While the Division considers the reasoned justification in the proposal a sufficient statement of the justification for the repeal of §134.401, it has elaborated on the stated reasons in the Reasoned Justification section of this adoption order. The preamble states that the 1997 rule was not Medicare based. It does not state whether the 1997 rule achieved effective medical cost control.

Comment: Several commenters requested that the preamble specifically state that the provisions of §134.401 will continue to apply to all pending and future disputes based on services from admissions prior to March 1, 2008.

Agency Response: The Division agrees. The changes in reimbursement under the adopted §134.404 apply only to those medical services provided in an inpatient acute care hospital with an admission date on or after March 1, 2008 (28 TAC §134.404(a)(1)). As noted in §134.404(a)(2) "{f}or admission dates prior to March 1, 2008, the law and Division of Workers' Compensation (Division) rules in effect for those dates of service shall apply." Section 134.401 was effective beginning August 1, 1997 and continued until its repeal. Reimbursement for medical services provided in an inpatient acute care hospital with an admission date prior to March 1, 2008 will be processed under the law and rules in effect on the date of admission and the former rule §134.401 will continue in effect for that purpose.

Comment: Several commenters suggested that the rule repeal should have a "savings clause" to ensure that §134.401 will continue to apply to all pending and future disputes on services prior to March 1, 2008.

Agency Response: The Division disagrees. The repeal preamble is explicit that §134.401 will continue to apply to all disputes on services prior to March 1, 2008. In addition, newly adopted §134.403(a)(4) makes it clear that Division rules in effect for dates of service prior to March 1, 2008 will apply to those services. Section 134.401 is the rule that was in effect for the dates of service prior to March 1, 2008. A "savings clause" would not make the applicability of §134.401 any clearer than the present text and is not necessary.

Comment: Several commenters requested that the preamble and rule specifically state that the provisions of §134.401 will not apply to disputes on services based on admissions prior to March 1, 2008, but that the default rule, §134.1(e)(3), will apply.

Agency Response: The Division disagrees. Section 8.005(c) of HB 7, 79th Legislature, provides that "A rule of the Texas Workers' Compensation Commission relating to a duty of that commission that is transferred to the authority of the division of workers' compensation of the Texas Department of Insurance under Subtitle A, Title 5, Labor Code, as amended by this Act, continues in effect as a rule of the commissioner of workers' compensation until the date on which the rule is superseded by a rule adopted by the commissioner of workers' compensation." This adoption order repeals the present rule effective from March 1, 2008 forward. The repeal does not deal with the validity of §134.401 but is used to transition into the new §134.403 and §134.404. The newly adopted §134.404(a)(4) retains the effectiveness of the rule for the relevant periods of service.

Additionally, the parties who provided services based on hospital admissions prior to March 1, 2008 did so with the expectation that they would be reimbursed under the rules in effect at that time, specifically §134.401. Retroactively applying §134.1(e)(3) rather than §134.401, which was in effect at the time the services were rendered, would almost surely generate disputes and litigation.

For With Changes: American Insurance Association; Christus Health Care Gulf Coast; Flahive, Ogden, & Latson; HCA; Hospital Partners of America; Insurance Counsel of Texas; Pringle and Gallagher; Texas Hospital Association; Texas Mutual Insurance Company; and Zenith Insurance.

Against: Vista Medical Center Hospital.

The repeal is adopted pursuant to Labor Code §402.00111 and §402.061. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides that the Commissioner of Workers' Compensation has the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 23, 2008.

TRD-200803278
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: July 13, 2008
Proposal publication date: February 22, 2008
For further information, please call: (512) 804-4715

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 19. ELECTRONIC REPORTING
SUBCHAPTER C. USE OF ELECTRONIC REPORTING

30 TAC §19.21

The Texas Commission on Environmental Quality (commission or agency) adopts new §19.21. Section 19.21 is adopted *without changes* to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1739) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of the adopted rule is to implement House Bill (HB) 1254 of the 80th Legislature, 2007. The bill, which became effective September 1, 2007, authorizes the commission to adjust fees as necessary to encourage electronic reporting and the use of the commission's electronic document receiving system. The adopted new rule implements HB 1254.

SECTION DISCUSSION

Adopted new §19.21 will implement HB 1254 by stating that the commission may adjust fees as necessary to encourage electronic reporting and the use of the commission's electronic document receiving system. Although the adopted section does not change specific fees, the inclusion of this section will serve as an advance notice that the commission may consider fee changes in the future for this purpose.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of this adopted rulemaking action is to implement HB 1254 of the 80th Legislature, 2007. The bill, which became effective September 1, 2007, authorizes the commission to adjust fees as necessary to encourage electronic reporting and the use of the commission's electronic document receiving system. The adopted rulemaking is procedural in nature and does not address environmental risks or exposures. Therefore, the adopted rulemaking does not constitute a major environmental rule, and is not subject to a formal regulatory analysis.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking does not meet any of the four applicability requirements in Texas Government Code, §2001.0225(a). Since there is no federal law establishing a standard for the commission's adjustment of fees to encourage electronic reporting, this rulemaking does not exceed a standard set by federal law. HB 1254 grants the commission authority to adjust fees as necessary to encourage electronic reporting and use of the commission's document receiving system, but states nothing further to establish a particular standard as to the manner in which the commission may do so. Since this rulemaking implements the bill consistent with the legislation, it does not exceed the requirements of state law. This rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to assess fees, but is instead is consistent with state statute. This rulemaking is not adopted solely under the general powers of the agency because it is to implement Texas Water Code (TWC), §5.128(a), which authorizes the commission to adjust fees. The commission invited public comment regarding the draft regulatory impact analysis determination and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the adopted rulemaking action under Texas Government Code, §2007.043. The specific purpose of this adopted rulemaking is to implement HB 1254, which authorizes the commission to adjust fees to encourage electronic reporting and the use of the commission's electronic document receiving system. The adopted rule would substantially advance these purposes by giving notice to those who use the commission's electronic document receiving system that fees may be adjusted.

Promulgation and enforcement of the adopted rule would constitute neither a constitutional nor a statutory taking of private real property. There are no burdens imposed on private real property under this rule because the adopted rule neither relates to, nor has any impact on the use or enjoyment of private real property. Also, the rule does not result in a reduction in property value. The rule is only procedural in nature. Therefore, the adopted rule would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the proposal is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

The commission invited comments regarding the consistency of this rulemaking and no comments were received.

PUBLIC COMMENT

The proposal was published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1739). The commission held a public hearing on March 27, 2008. The comment period closed on March 31, 2008. The commission did not receive any comments.

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.013, which establishes the commission's general jurisdiction; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which allows the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; §5.105, which requires the commission to, by rule, establish and approve all general policy of the commission; HB 1254, which authorizes the commission to encourage the use of electronic reporting; and to adjust fees as necessary to encourage electronic reporting and use of the commission's document receiving system.

The adopted new rule implements TWC, §§5.013, 5.102, 5.103, 5.105, and 5.128 and HB 1254.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803195

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: February 29, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

CHAPTER 50. ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS
SUBCHAPTER F. ACTION BY THE COMMISSION

30 TAC §50.113

The Texas Commission on Environmental Quality (commission or agency) adopts an amendment to §50.113 *without changes* to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2118) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking implements House Bill (HB) 2654, 80th Legislature, 2007. HB 2654 amended Texas Water Code (TWC), §27.021 and added new TWC, §27.023 to allow the commission to issue a general permit authorizing the use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. These legislative changes are intended to promote desalination technology and address the need for public water supply systems to dispose of drinking water treatment residuals. To implement HB 2654, this rulemaking amends §50.113(d).

The amended rule adds two new types of applications and actions to a listing of applications that the commission may act on without holding a contested case hearing. This listing is in §50.113(d). There are two paragraphs under §50.113(d) that are affected by the amendment.

First, the amendment to §50.113(d)(5) updates the list of applications that are not subject to a contested case hearing by adding an application for a Class I injection well used only for the disposal of nonhazardous drinking water treatment residuals. This exception is in addition to the exception for applications for disposal of desalination brine which was added by a previous rulemaking in the September 10, 2004, issue of the *Texas Register* (29 TexReg 8814). Amendment of §50.113(d)(5) also includes updates to reflect use of the term "nonhazardous brine from a desalination operation" instead of "desalination brine," and inserts the word "injection" into the phrase "Class I injection wells," to achieve consistency with the title of TWC, §27.021 as amended by HB 2654.

Second, a new paragraph has been inserted as §50.113(d)(6) with renumbering of subsequent paragraphs. The new paragraph implements part of TWC, §27.023 in HB 2654 that allows the commission to issue a general permit authorizing a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals, without providing the opportunity for a contested case hearing, as long as all requirements for a Class I injection well permit are met. Public notice of, and the opportunity to comment on, a permit application is not affected by this rulemaking. Removing the opportunity for a contested case hearing may expedite the approval of Class I injection well permits for the disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals. The commission's ability to hold a discretionary hearing under the provisions of TWC, §5.102(b) was not amended by HB 2654.

Amendments to 30 TAC Chapters 55, 305 and 331 are also adopted in this issue of the *Texas Register* to implement HB 2654 and to incorporate other changes to facilitate disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals.

SECTION DISCUSSION

§50.113. Applicability and Action on Application.

The commission amends §50.113(d)(5) by adding a permit application for a Class I injection well used only for the disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals to the list of applications upon which the commission may act without holding a contested case hearing. The commission adopts §50.113(d)(6) to include the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit, or the authorization for the use of an injection well under a general permit in the list of items upon which the commission may act without holding a contested case hearing. Current paragraphs (6) - (8) are renumbered as paragraphs (7) - (9), respectively.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not intended to reduce risks to human health from environmental exposure, nor does it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The intent of this rulemaking is to implement HB 2654, passed during the 80th Legislature, 2007, and to revise criteria for authorizing Class I nonhazardous wells injecting desalination concentrate and other water treatment residuals from public water systems so that the state's rules are no more stringent than federal Class I nonhazardous injection well regulations. The specific intent of the amendment to Chapter 50 is to address the authority of the commission to take actions regarding the general permit and authorizations under the general permit. The rule substantially advances this purpose by adding notices of intent submitted under §331.203 to the applicability of Chapter 50, Subchapter F. Further, applications for a Class I injection well permit used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well used only for the disposal of nonhazardous brine from desalination operations or drinking water treatment residuals are added to the list of items upon which the commission may act without holding a contested case hearing.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the amendment would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the amendment will be significant with respect to the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking does not exceed any standard set by federal law but rather amends the rules so that they are no more stringent or restrictive than the federal regulations. The adopted rule does not exceed the requirements of state law under the TWC, Chapter 27. Further, the adopted rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program. Finally, the rule is not adopted solely under the general powers of the agency, but rather specifically under TWC, §27.023(m), which allows the commission to adopt rules to implement the general permit authorizing use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals and TWC, §27.109, which authorizes the commission to adopt rules to implement TWC, Chapter 27 (regarding Injection Wells), as well as the other general powers of the agency.

The commission invited public comment regarding the regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the amendment to Chapter 50 and performed a preliminary assessment of whether the amendment would constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the amendment is to implement HB 2654, authorizing use of a general permit for Class I injection wells injecting only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. The amendment would substantially advance this purpose by amending §50.113 to add to the list of actions upon which the commission may act without first holding a contested case hearing applications for a Class I injection well permit used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well permit used only for the disposal of nonhazardous brine from desalination operations or drinking water treatment residuals.

Promulgation and enforcement of the amendment would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rule because the amendments neither relate to, nor have any impact on the use or enjoyment of private real property, and there would be no reduction in property value as a result of this rule. Therefore, the adopted rule would not constitute a taking under Texas Government Code, Chapter 2007.

The commission has no reasonable alternative that could accomplish the specific purpose of addressing the commission's authority to act other than by amending Chapter 50.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rule is not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The proposal was published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2118). The commission held a public hearing in Austin on April 8, 2008. The comment period closed on April 14, 2008. No comments pertaining to the proposed amendment to Chapter 50 were received.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803196
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT

The Texas Commission on Environmental Quality (commission or agency) adopts amendments to §55.101 and §55.201 *without changes* to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2122) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking implements House Bill (HB) 2654, 80th Legislature, 2007. HB 2654 amended Texas Water Code (TWC), §27.021 and added new TWC, §27.023 to allow the commission to issue a general permit authorizing the use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. These legislative changes are intended to promote desalination technology and address the need for public water supply systems to dispose of drinking water treatment residuals. To implement HB 2654, this rulemaking amends §55.101(f) and §55.201(i).

The amended rules add two new types of applications and actions to a listing of applications that the commission may act on without holding a contested case hearing. This listing is in §55.101(f). There are two paragraphs under §55.101(f) that are affected by the adopted amendments. First, the amendment to §55.101(f)(4) updates the list of applications that are not subject to a contested case hearing by adding an application for a Class I injection well used only for the disposal of nonhazardous drinking water treatment residuals. This exception is in addition to the exception for applications for disposal of desalination brine which was added by a previous rulemaking in the September 10, 2004, issue of the *Texas Register* (29 TexReg 8817). Amendment of §55.101(f)(4) also includes updates to reflect use of the term "nonhazardous brine from a desalination operation" instead of "desalination brine," and inserts the word "injection" into the phrase "Class I injection wells," to achieve consistency with the title of TWC, §27.021 as amended by HB 2654.

Second, a new paragraph has been inserted as §55.101(f)(5) with renumbering of the subsequent paragraph. The new paragraph implements part of TWC, §27.023 in HB 2654 that allows the commission to issue a general permit authorizing a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals, without providing the opportunity for a contested case hearing, as long as all requirements for a Class I injection well permit are met. Public notice of, and the opportunity to comment on, a permit application will not be affected by this rulemaking. Removing the opportunity for a contested case hearing may expedite the approval of Class I injection well permits for the disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals. The commission's ability to hold a discretionary hearing under the provisions of TWC, §5.102(b) was not amended by HB 2654.

Amendments to 30 TAC Chapters 50, 305 and 331 are also adopted in this issue of the *Texas Register* to implement HB 2654 and to incorporate other changes to facilitate disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals.

SECTION BY SECTION DISCUSSION

Subchapter D. Applicability and Definitions

§55.101. Applicability.

The adopted rules amend §55.101(f)(4) by adding a permit application for a Class I injection well used only for the disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals to the list of applications upon which the commission may act without holding a contested case hearing. The rules add §55.101(f)(5) to include the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit, or the authorization for the use of an injection well under a general permit in the list of items upon which the commission may act without holding a contested case hearing. Current paragraph §55.101(f)(5) is renumbered as paragraph (6). Adopted §55.101(f)(5) implements part of TWC, §27.023 in HB 2654 that allows the commission to issue a general permit authorizing a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals, without providing the opportunity for a contested case hearing.

Subchapter F. Requests for Reconsideration or Contested Case Hearing

§55.201. Requests for Reconsideration or Contested Case Hearing.

The adopted rules amend §55.201(i)(6) by adding a permit application for a Class I injection well used only for the disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals to the list of applications for which there is no right to a contested case hearing. The adopted rule adds §55.201(i)(7) to include the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit, or the authorization for the use of an injection well under a general permit in the list of items for which there is no right to a contested case hearing. Current paragraphs (7) - (9) are renumbered as paragraphs (8) - (10), respectively.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not intended to reduce risks to human health from environmental exposure, nor does it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The intent of this rulemaking is to implement HB 2654, passed during the 80th Legislature, 2007, and to revise criteria for authorizing Class I nonhazardous wells injecting desalination concentrate and other water treatment residuals from public water systems so that the state's rules are no more stringent than federal Class I nonhazardous injection well regulations. The specific intent of the amendments to Chapter 55 is to address certain procedural rights regarding applications for Class I injection well permits used only for the disposal of drinking water treatment

residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well authorized to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. The rule substantially advances this purpose by adding notices of intent submitted under §331.203 to the applicability of Chapter 55, Subchapters D - G and by adding to the list of actions for which there is no right to a contested case hearing applications for a Class I injection well permit used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well used only for the disposal of nonhazardous brine from desalination operations or drinking water treatment residuals.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the amendments would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the amendment will be significant with respect to the economy; therefore, the amendments will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking does not exceed any standard set by federal law but rather amends the rules so that they are no more stringent or restrictive than the federal regulations. The rules adopted do not exceed the requirements of state law under TWC, Chapter 27. Further, the rules adopted do not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program. Finally, the rule is not adopted solely under the general powers of the agency, but rather specifically under TWC, §27.023(m), which allows the commission to adopt rules to implement the general permit authorizing use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals and TWC, §27.109, which authorizes the commission to adopt rules to implement TWC, Chapter 27, as well as the other general powers of the agency.

The commission invited public comment regarding the Regulatory Impact Analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the amendments to Chapter 55 and performed an assessment of whether the amendments would constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the amendments is to implement HB 2654, authorizing use of a general permit for Class I injection wells injecting only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. The amendments substantially advance this purpose by amending §55.201 to add to the list of actions for which there is no right to a contested case hearing applications for a Class I injection well permit used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well used only for the disposal of nonhazardous brine from desalination operations or drinking water treatment residuals.

Promulgation and enforcement of the amendments constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rulemaking because the amendments neither relate to, nor have any impact on the use or enjoyment of private real property, and there would be no reduction in property value as a result of this rulemaking. Therefore, the adopted rules would not constitute a taking under Texas Government Code, Chapter 2007.

The commission has no reasonable alternative that could accomplish the specific purpose of addressing certain procedural rights regarding applications for Class I injection well permits used only for the disposal of nonhazardous desalination concentrate or drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well authorized to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. These procedural issues regarding permit applications and notices of intent can only be affected through amendments to the commission's rules.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The proposal was published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2122). The commission held a public hearing in Austin on April 8, 2008. The comment period closed on April 14, 2008. No comments pertaining to the proposed amendments to Chapter 55 were received.

SUBCHAPTER D. APPLICABILITY AND DEFINITIONS

30 TAC §55.101

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to

adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803197
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

SUBCHAPTER F. REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

30 TAC §55.201

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The adopted amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803198
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

CHAPTER 291. UTILITY REGULATIONS

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§291.3, 291.21, 291.41, 291.87, 291.88, 291.101, 291.105, and 291.113.

Sections 291.41, 291.87, 291.88, 291.101, 291.105, and 291.113 are adopted *without changes* as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 871) and will not be republished. Section 291.3 and §291.21 are adopted *with changes* to the proposed text.

The commission withdraws the proposal of §291.14 and §291.144 as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 871).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2007, the 80th Legislature passed Senate Bill (SB) 3 and House Bill (HB) 3475. Sections 2.05, Definitions; 2.06, Consolidated Billing; 2.07, Rates; 2.08, Certificates of Convenience and Necessity (CCNs); 2.32, Duties of Water Service Providers; 2.39, CCNs; and 7.01, Rates, of SB 3 and HB 3475 relate to retail public utilities.

SB 3, §2.05 amended Texas Water Code (TWC), §13.002(1-a) to alter the definition of "landowner" or "owner of a tract of land" to denote that the owner or multiple owners of a single deeded tract of land are as shown on the appraisal roll of the appraisal district established for each county in which the property is located. This section of SB 3 also amended other definitions not addressed in this rulemaking.

SB 3, §2.06 amended TWC, Chapter 13, Subchapter E, by adding §13.147, Consolidated Billing and Collection Contracts, to allow a retail public utility providing water service to contract with a retail public utility providing sewer service for the billing and collection of the sewer service provider's fees and payments as part of a consolidated process. This service may only be provided by the water provider for customers that are served by both providers in an area covered by both providers' CCNs. If the water provider refuses to enter into a contract with the sewer provider, or if they cannot agree on the terms of the contract, the sewer service provider may petition the commission to issue an order requiring the water provider to provide that service.

SB 3, §2.07 amended TWC, Chapter 13, Subchapter F by adding §13.188, Adjustment for Change in Energy Costs. This section allows the commission to adopt a procedure through which a utility can file an application for an adjustment in the utility's rates to reflect an increase or decrease in documented energy costs through the use of a pass through clause. The pass through, whether an increase or a decrease, shall be implemented no later than an annual basis, unless the commission determines a special circumstance applies.

SB 3, §2.08 and §2.39 amended TWC, Subchapter F, §13.2451, to allow a municipality to extend a CCN to area outside the municipality's extraterritorial jurisdiction (ETJ) so long as the munici-

pality meets the criteria outlined in §13.241 for granting of a CCN. TWC, §13.2451(c) was also added to allow the commission, after notice to the municipality and the opportunity for a hearing, to decertify an area outside the municipality's ETJ if the municipality does not provide service to the area on or before the fifth anniversary of the date the CCN was granted for the area. This section does not apply for an area that was transferred to a municipality on approval of the commission or in relation to which the municipality has spent public funds. TWC, §13.2451(d) was added to stipulate that if a conflict between this section and §13.245 arise, then §13.245 prevails. SB 3, §2.39, also amended TWC, Subchapter F, §13.2451, to specify that this section applies only to: 1) an application to obtain or amend a CCN submitted to the TCEQ on or after the effective date of this Act; 2) a proceeding to amend or revoke a CCN initiated on or after the effective date of this Act; 3) a CCN issued to a municipality regardless of the date the certificate was issued; 4) an application filed by a municipality to obtain or amend a CCN, regardless of the date the application was filed; and, 5) a proceeding to amend or revoke a CCN held by a municipality or by a utility owned by a municipality, regardless of the date the proceeding was initiated.

SB 3, §2.32, added Local Government Code, Subchapter Z, §402.911, to require a water service provider that meets specific criteria to provide a municipality or district with relevant customer information so the municipality or district may bill the customer directly for sewer service and verify water consumption. Relevant customer information includes name, address, phone number, monthly meter readings, monthly consumption information, billing adjustments, and specifics about the meter such as brand, model, age, and location. The legislation also requires a municipality or district to reimburse the water provider for its reasonable and actual costs for providing this service to the municipality or district. The municipality or district may also provide a notice to customers delinquent for more than 90 days for sewer service. This notice must include the past due amount and the deadline by which the past due notice must be paid before water service is disconnected. After such a notice is provided, the municipality or district may notify the water service provider of a customer who fails to make timely payment. On receipt of this notice, the water service provider must discontinue water service to the municipality or district's sewer customer. This section applies to a water provider that is located in a county with a population greater than 1.3 million and in which a customer's sewer service is provided by a municipality or conservation and reclamation district for the same area, except for a nonprofit water supply or sewer service corporation created under TWC, Chapter 67, or a district created under TWC, Chapter 65.

SB 3, §7.01, amended TWC, Chapter 49, Subchapter H, by adding §49.2122, which allows a district to establish different charges, fees, rentals, or deposits among classes of customers that are based on any factor the district considers appropriate. These factors include the similarity of the type of customer to other customers; the type of service provided; the cost of facilities and operations including additional costs for security, recreational facilities, or fire protection; and/or the total revenue, including ad valorem tax revenues and connection fees received from a particular class of customers.

HB 3475 amended Local Government Code, §421.017 and applies to counties adjacent to an international border and in which a military installation and national recreational area are located. This bill affects these specific counties by allowing them to acquire, construct, operate, or maintain a water supply or sewage system to serve the unincorporated areas of the county.

SECTION BY SECTION DISCUSSION

Subchapter A: General Provisions

§291.3, Definition of Terms

The commission amends the definition of "landowner" in §291.3(19) to add the phrase "as shown on the appraisal roll of the appraisal district established for each county in which the property is located" to match the language of TWC, §13.002(1-a), as amended by SB 3, §2.05, 80th Legislative Session, 2007.

The commission withdraws the proposed definition of "nonfunctioning system" in §291.3(28) in response to comment and will address the implementation of TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007, in a subsequent rulemaking.

§291.14, Emergency Orders

The commission withdraws the proposed amendment to §291.14(b)(2) in response to comment and will address the implementation of TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007, in a subsequent rulemaking.

Subchapter B: Rates, Rate making, and Rates/Tariff Changes

§291.21, Form and Filing of Tariffs

The commission amends §291.21, to add a reference in §291.21(b)(2)(A)(vi) to allow for minor tariff changes for consolidated billing between a separate retail public water and sewer provider, as defined in §291.3(39), for the same service area under TWC, §13.147, as added by SB 3, §2.06, 80th Legislative Session, 2007. A retail public water and sewer provider is defined in §291.3(39) as "any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation." This amendment is consistent with other minor tariff provisions regarding billing for sewer service.

The commission adopts new §291.21(b)(2)(A)(ix) to clarify that the implementation of an energy cost adjustment clause is a minor tariff change. The commission adopts this change in response to comment and to implement TWC, §13.046, as added by SB 3, §2.07, 80th Legislative Session, 2007.

The commission withdraws proposed new §291.21(k)(2)(E) in response to comment and will address the implementation of TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007, in a subsequent rulemaking.

The commission withdraws proposed new §291.21(k)(4) in response to comment.

The commission adopts new §291.21(p) to allow the executive director to authorize a utility to timely adjust the utility's rates to reflect an increase or decrease in documented energy costs with a pass through clause. This addition includes an approval and implementation procedure. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

The commission adopts new §291.21(p)(1) to allow a utility to request the inclusion of an energy cost adjustment clause in its tariff. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

The commission adopts new §291.21(p)(2) to require a utility to file an application and provide notice to its affected customers to adopt an energy cost adjustment clause. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

The commission adopts new §291.21(p)(3) to clarify that the executive director's review of energy cost adjustment clause application is not subject to a contested case hearing but that the executive director will hold an uncontested public meeting upon request by a legislator who represents that area served by the utility or if the executive director determines that there is substantial public interest in the matter. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

The commission adopts new §291.21(p)(4) to require that increases or decreases in documented energy costs must be passed through to the utility's customers on at least an annual basis and that notice of the implementation must be provided. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

The commission adopts new §291.21(p)(5) to outline the requirements for providing notice to the executive director and the utility's customers when a utility implements or changes its energy cost adjustment clause. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

The commission adopts new §291.21(p)(6) to specify under what conditions the executive director may suspend the adoption or implementation of an energy cost adjustment clause and that the suspension will continue until the utility provides additional documentation requested by the executive director. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

The commission adopts new §291.21(p)(7) to provide that energy cost adjustment clauses may not apply to contracts or transactions between affiliated interests. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

The commission adopts new §291.21(p)(8) to provide that a proceeding under §291.21(p) is not a rate case, and TWC, §13.187 does not apply. The commission adopts this change in response to comment and to implement TWC, §13.188, as amended by SB 3, §2.07, 80th Legislative Session, 2007.

Subchapter C: Rate-Making Appeals

§291.41, Appeal of Rate-making Pursuant to the Texas Water Code, §13.043

The commission amends §291.41 to add a phrase in §291.41(i) to clarify that to the extent of a conflict between this subsection and TWC, §49.2122, TWC, §49.2122 prevails. The commission adopts this change because TWC, §49.2122, as amended by SB 3, §7.01, 80th Legislative Session, 2007, allows a district to establish different charges, fees, rentals, or deposits among classes of customers based on any factor the district considers appropriate, including the factors listed in TWC, §49.2122(a), unless the district has acted arbitrarily or capriciously.

Subchapter E: Customer Service and Protection

§291.87, Billing

The commission adopts new §291.87(g) to allow for a consolidated billing process between separate retail public water and sewer providers for the same service area to implement TWC, §13.147, as added by SB 3, §2.06, 80th Legislative Session, 2007.

The commission adopts §291.87(g)(1) to clarify that this subsection applies to all retail public utilities. The commission adopts this change to implement TWC, §13.147, as added by SB 3, §2.06, 80th Legislative Session, 2007.

The commission adopts §291.87(g)(2) to allow a retail public sewer utility to enter into a contract for consolidated billing, or seek a commission order requiring consolidated billing, from a retail public water utility service for the same service area. The commission adopts this change to implement TWC, §13.147(a), as added by SB 3, §2.06, 80th Legislative Session, 2007.

The commission adopts §291.87(g)(3) to require that a contract or order between a retail public water and sewer provider for the same service area under this subsection must provide procedures and deadlines for submitting filing and customer information to the water service provider and for the delivery of collected fees and payments to the sewer service provider. The commission adopts this change to implement TWC, §13.147(b), as added by SB 3, §2.06, 80th Legislative Session, 2007.

The commission adopts §291.87(g)(4) to require or allow a retail public water service provider that provides consolidated billing and collection of fees and payments to terminate the water services of a person whose sewage services account is in arrears for nonpayment and charge a customer a reconnection fee if the customer's water service is terminated for nonpayment of the customer's sewage services account. The commission adopts this change to implement TWC, §13.147(c), as added by SB 3, §2.06, 80th Legislative Session, 2007.

The commission adopts §291.87(g)(5) to allow a retail public water service provider that provides consolidated billing and collection of fees and payments to impose on each customer of the retail public sewer service provider a reasonable fee to recover costs associated with providing consolidated billing and collection of fees and payments for sewage services. The commission adopts this change to implement TWC, §13.147(d), as added by SB 3, §2.06, 80th Legislative Session, 2007.

The commission has relettered the subsequent subsections based on the addition of adopted new §291.87(g).

§291.88, Discontinuance of Service

The commission amends §291.88(e) to outline the duties of a water service provider to an area served by a sewer service provider in a county with a population of more than 1.3 million and in which a customer's sewer service is provided by a municipality or conservation and reclamation district that also provides water service to other customers and the same customer's water service is provided by another entity, but not including a nonprofit water supply and/or sewer service corporation created under TWC, Chapter 67, or a water district created under TWC, Chapter 65. The commission adopts this change to implement Local Government Code, §402.911, as added by SB 3, §2.32, 80th Legislative Session, 2007.

The commission amends §291.88(e)(3)(A) to specify which political subdivisions this subsection applies. This section applies

only to an area that is located in a county that has a population of more than 1.3 million; and in which a customer's sewer service is provided by a municipality or conservation and reclamation district that also provides water service to other customers and the same customer's water service is provided by another entity. The commission adopts this change to implement Local Government Code, §402.911(a), as added by SB 3, §2.32, 80th Legislative Session, 2007.

The commission amends §291.88(e)(3)(B) to require the water service provider to provide the municipality or district with any relevant customer information so that the municipality or district may bill users of the sewer service directly and verify the water consumption of users. Relevant customer information provided under this section includes the name, address, and telephone number of the customer of the water service provider, the monthly meter readings of the customer, monthly consumption information, including any billing adjustments, and certain meter information, such as brand, model, age, and location. The commission adopts this change to implement Local Government Code, §402.911(b), as added by SB 3, §2.32, 80th Legislative Session, 2007.

The commission amends §291.88(e)(3)(C) to require the municipality or district to reimburse the water service provider for its reasonable and actual incremental costs for providing services to the municipality or district under this section. The commission also adopts a definition of "incremental costs" and adopts the circumstances under which the water service provider must provide the municipality or district with documentation certified by a certified public accountant. The commission adopts this change to implement Local Government Code, §402.911(c), as added by SB 3, §2.32, 80th Legislative Session, 2007.

The commission amends §291.88(e)(3)(D) to allow for written notice to persons to whom the municipality's or district's sewer service system provides service if the person has failed to pay for the service for more than 90 days and specifies the content and delivery format of the notice. The commission adopts this change to implement Local Government Code, §402.911(d), as added by SB 3, §2.32, 80th Legislative Session, 2007.

The commission amends §291.88(e)(3)(E) to allow for a notification to the water service provider for the failure of timely payment of sewer charges by a person and allow the sewer service provider to request that the water service provider discontinue service to the person. The commission adopts this change to implement Local Government Code, §402.911(e), as added by SB 3, §2.32, 80th Legislative Session, 2007.

The commission amends §291.88(e)(3)(F) to clarify that this subsection does not apply to a nonprofit water supply or sewer service corporation created under TWC, Chapter 67, or a district created under TWC, Chapter 65. The commission adopts this change to implement Local Government Code, §402.911(f), as added by SB 3, §2.32, 80th Legislative Session, 2007.

Subchapter G: Certificates of Convenience and Necessity

§291.101, Certificate Required

The commission amends §291.101(a) to reflect the legislature's intent to treat affected counties, adjacent to an international border in which a military installation and a national recreation area are located, in the same manner as a municipality. Municipalities are not required to obtain a CCN to provide service to an uncertificated area. The commission adopts this change to implement Local Government Code, §412.017, as amended by HB 3475, 80th Legislative Session, 2007.

§291.105, Contents of Certificate of Convenience and Necessity Applications

The commission amends §291.105(c)(1) by deleting the phrase "except as provided by paragraph (2) of this subsection, if." The language in existing paragraph (2) was deleted by the legislative amendments to corresponding language in TWC, §13.2451 by SB 3, §2.08, 80th Legislative Session, 2007.

The commission adopts new §291.105(c)(2) to require a municipality that seeks to extend a certificate of public convenience and necessity beyond the municipality's ETJ to comply with TWC, §13.241. The commission adopts this change to implement TWC, §13.2451, as amended by SB 3, §2.08, 80th Legislative Session. Under SB 3, §2.39(4), 80th Legislative Session, this adopted amendment applies to any application filed by a municipality or by a utility owned by a municipality for a certificate of public convenience and necessity or for an amendment to a certificate, regardless of the date the application was filed.

The commission deletes existing §291.105(c)(2) because the corresponding language in TWC, §13.2451 was deleted from TWC, §13.2451 by SB 3, §2.08, 80th Legislative Session, 2007.

The commission adopts new §291.105(c)(3), to clarify that if a conflict exists between TWC, §13.245 and this subsection, TWC, §13.245 prevails.

§291.113, Revocation or Amendment of Certificate

The commission adopts new §291.113(a)(5) to provide for the revocation or amendment of an area certificated to a municipality outside the municipality's ETJ when the municipality has not provided service to the area on or before the fifth anniversary of the date the certificate of public convenience and necessity was granted for the area, except that an area that was transferred to a municipality on approval of the commission or the executive director and in which the municipality has spent public funds may not be revoked or amended under this paragraph. The commission adopts this change to implement TWC, §13.2451(c), as added by SB 3, §2.08, 80th Legislative Session, 2007. Pursuant to SB 3, §2.39(3) and (5), 80th Legislative Session, 2007, this adopted amendment applies to a proceeding to amend or revoke a certificate of public convenience and necessity held by a municipality or by a municipally owned utility regardless of the date the proceeding was initiated and regardless of the date the certificate was issued.

Subchapter J: Enforcement, Supervision, and Receivership

§291.144, Fines and Penalties

The commission withdraws proposed new §291.144(b) in response to comment and will implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007, in a subsequent rulemaking. With the withdrawal of proposed new §291.144(b), the current implied subsection (a) and its catchline remains unchanged.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative

Procedures Act. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the adopted rules is to implement provisions enacted in SB 3 and HB 3475 of the 80th Legislature, 2007. Generally, these amendments are intended to impact only the economic regulation of water and sewer providers. More specifically, the provisions amend the definition of a landowner for the purpose of CCN regulation, allow for consolidated billing and collection contracts between retail public water and sewer providers; allow for adjustments to utility rates to account for increases or decreases in documented energy costs; revise the rules relating to obtaining, amending, and decertifying a municipality's CCN for water and sewer service; create new duties of a water service provider to certain political subdivisions that provide sewer service to the same area; allow a district to establish different utility rates among classes of customers; and allow certain counties to operate a utility in the same manner as a municipality under Local Government Code, Chapter 402. The adopted rules are not intended to have any impact on environmental regulations. Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

This rulemaking does not qualify as a major environmental rule because it does not have as its specific intent the protection of the environment or the reduction of risk to human health from environmental exposure, nor will it have an adverse economic effect. Additionally, this rulemaking does not meet the definition of a major environmental rule because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or, 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because the adopted rules: 1) are specifically required by state law, namely the TWC and Local Government Code, and do not exceed a standard set by federal law; 2) do not exceed the express requirements of the TWC or Local Government Code; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) the adopted rules will not be adopted solely under the general powers of the commission.

Based on the foregoing, the adopted rulemaking does not constitute a major environmental rule and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted amendments to Chapter 291 and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The intent of the adopted rules is to implement amendments enacted in SB 3 and HB 3475, 80th Legislature, 2007.

The adopted rules would substantially advance the intent of the rulemaking by amending the definition of a landowner for the purpose of CCN regulation; allowing for consolidated billing and collection contracts between retail public water and sewer providers; allowing for adjustments to utility rates to account for increases or decreases in documented energy costs; revising the rules relating to obtaining, amending, and decertifying a municipality's CCN for water and sewer service; creating new duties of a water service provider to certain political subdivisions that provide sewer service to the same area; allowing a district to establish different utility rates among classes of customers; and allowing certain counties to operate a utility in the same manner as a municipality under Local Government Code, Chapter 402.

Promulgation and enforcement of these adopted rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden nor restrict or limit the owner's right to property. More specifically, these rules implement CCN regulations, water and sewer utility rate regulations, and other related regulations of water and sewer service providers, none of which imposes any burdens or restrictions on private real property. Therefore, the adopted amendments do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period and no comments were received.

PUBLIC COMMENT

The commission held a public hearing for this rule on February 26, 2008, in Austin, Texas. The public comment period for this rulemaking closed on March 3, 2008. The commission received comments from Representative Callegari; Aqua Texas, Inc. (Aqua); Russell & Rodriguez LLP on behalf of the Cities' Coalition on CCNs (Cities' Coalition); and Texas Rural Water Association (TRWA).

RESPONSE TO COMMENTS

Representative Callegari and Aqua commented that the proposed rules did not include a procedure for water and sewer utilities to file an application with the commission to adjust their rates to reflect changing energy costs. In its comments, Aqua provided a recommended procedure. Aqua's procedure included a requirement that the utility provide energy cost information in its annual report, or the utility would not be able to implement an increase in energy costs. The procedure also included a provision under which decreases in energy costs

of $0.50 or less would be implemented within 90 days of the decrease, or the executive director could order the utility to implement the change. Additionally, Representative Callegari and Aqua commented that the proposed rules did not provide a proper mechanism for utilities to pass through documented increases and decreases in energy costs within a reasonable time.

The commission responds that it had intended to develop the procedure for adopting and implementing energy cost adjustment clauses in a regulatory guidance document but acknowledges that the procedure can be placed in the rules. Regarding the pass through, the proposed rules allowed a utility to adjust its rates to reflect changing energy costs via a surcharge. However, the commission acknowledges that this can be done via a pass through clause. Therefore, the commission withdraws proposed §291.21(k)(4) and adds §291.21(b)(2)(A)(ix) and §291.21(p). These provisions clarify that the implementation of this clause is processed by the executive director as a minor tariff change and include the procedure for the approval and implementation of the clause. The commission incorporated some of the procedures recommended by Aqua into §291.21(b)(2)(A)(ix) and §291.21(p) but did not adopt the annual report provision or the $0.50 decrease provision. The commission may alter its annual report form so that utilities will have to provide their documented energy costs within the report; however, the commission will not make the implementation of increases in document energy costs dependent on providing such information as utilities already have to provide this information when they provide notice of the implementation. Furthermore, the utility must implement increases and decreases on at least an annual basis and the executive director can suspend the implementation if it finds the provided information insufficient. The commission also did not adopt the $0.50 decrease provision because all decreases in documented energy costs must be implemented within a reasonable time and on at least an annual basis. TWC, §13.188, does not distinguish between decreases that are more than $0.50 and decreases that are equal to or less than $0.50, and the commission does not find any reason to create such a distinction.

Aqua commented that §291.21(h)(4)(B) should be amended to apply to affected customers only.

The commission declines to make this change as that change is outside the scope of this rulemaking.

Cities' Coalition commented that they are in support of the proposed change to the definition of "landowner" in §291.3(19).

The commission acknowledges this comment in support of the proposed rule.

Cities' Coalition commented that they are in support of the proposed change to §291.105(c)(2) and (3) which address the ability to extend a CCN beyond a municipality's ETJ.

The commission acknowledges this comment in support of the proposed rule.

Cities' Coalition commented that proposed §291.113(a)(5) provides that if an area is certificated to a municipality outside of its ETJ, the municipality must be serving that area on or before the fifth anniversary of the date the CCN was granted or the CCN can be revoked. Cities' Coalition stated that the clear intent of this language is to apply the five-year provision to all extensions of CCNs that are granted after September 1, 2007.

The commission responds that SB 3, §2.39, specifies the instances in which TWC, §13.2451, applies. Under §2.39(3), TWC, §13.2451 applies to "a certificate of public convenience and necessity issued to a municipality, *regardless of the date the certificate was issued* (emphasis added)." Therefore, §291.113(a)(5) applies to a municipality's CCN no matter when the CCN was issued. The commission has made no change in response to this comment.

Cities' Coalition commented that the opportunity for a hearing should detail that a contested case hearing should be allowed.

The commission responds that under §291.113(a), the opportunity for a contested case hearing already exists. No change has been made in response to this comment.

TRWA commented that the definition of "nonfunctioning system" in proposed §291.3(28) improperly applies only to utilities. Under TWC, §13.046(a), TRWA proposed to broaden the definition of "nonfunctioning system" to include a retail public utility that is failing to maintain adequate water or wastewater capacity; is failing to maintain facilities capable of providing continuous and adequate service; or is failing to provide service adequate for the protection of public health and welfare or the environment. TRWA also commented that proposed §291.21(k)(2)(E) failed to accurately implement the procedure contemplated by TWC, §13.046(a), and as proposed, this subparagraph does not protect cities, districts, or nonprofit water supply companies from expensive and time-consuming appeals by customers of a nonfunctioning system.

The commission responds that in light of TRWA's comment regarding the definition of "nonfunctioning system," the commission will need to reconsider whether the definition applies to retail public utilities or only to utilities. Even if the commission did expand the definition at this time to include all retail public utilities, retail public utilities that are not utilities would not have had received proper notice that the proposed rules regarding nonfunctioning systems will apply to them. Therefore, the proposed definition of "nonfunctioning system" and other proposed rules regarding nonfunctioning systems will be withdrawn. The commission will not adopt §291.3(28) and §291.21(k)(2)(E) as proposed and withdraws proposed §291.14 and §291.144. The commission will address the implementation of TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007, in a subsequent rulemaking.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §291.3

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out its duties under the TWC, and TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The adopted amendment implements TWC, §13.002.

§291.3. Definitions of Terms.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Acquisition adjustment--

(A) The difference between:

(i) the lesser of the purchase price paid by an acquiring utility or the current depreciated replacement cost of the plant, property, and equipment comparable in size, quantity, and quality to that being acquired, excluding customer contributed property; and

(ii) the original cost of the plant, property, and equipment being acquired, excluding customer contributed property, less accumulated depreciation.

(B) A positive acquisition adjustment results when subparagraph (A)(i) of this paragraph is greater than subparagraph (A)(ii) of this paragraph.

(C) A negative acquisition adjustment results when subparagraph (A)(ii) of this paragraph is greater than subparagraph (A)(i) of this paragraph.

(2) Affected county--A county to which Local Government Code, Chapter 232, Subchapter B, applies.

(3) Affected person--Any landowner within an area for which an application for a new or amended certificate of public convenience and necessity is filed; any retail public utility affected by any action of the regulatory authority; any person or corporation, whose utility service or rates are affected by any proceeding before the regulatory authority; or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.

(4) Affiliated interest or affiliate--

(A) any person or corporation owning or holding directly or indirectly 5.0% or more of the voting securities of a utility;

(B) any person or corporation in any chain of successive ownership of 5.0% or more of the voting securities of a utility;

(C) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by a utility;

(D) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by any person or corporation that owns or controls directly or indirectly 5.0% or more of the voting securities of any utility or by any person or corporation in any chain of successive ownership of 5.0% of those utility securities;

(E) any person who is an officer or director of a utility or of any corporation in any chain of successive ownership of 5.0% or more of voting securities of a public utility;

(F) any person or corporation that the commission, after notice and hearing, determines actually exercises any substantial influence or control over the policies and actions of a utility or over which a utility exercises such control or that is under common control with a utility, such control being the possession directly or indirectly of the power to direct or cause the direction of the management and policies of another, whether that power is established through ownership or voting of securities or by any other direct or indirect means; or

(G) any person or corporation that the commission, after notice and hearing, determines is exercising substantial influence over the policies and action of the utility in conjunction with one or more persons or corporations with which they are related by ownership or blood relationship, or by action in concert, that together they are affiliated within the meaning of this section, even though no one of them alone is so affiliated.

(5) Agency--Any state board, commission, department, or officer having statewide jurisdiction (other than an agency wholly financed by federal funds, the legislature, the courts, the Workers' Compensation Commission, and institutions for higher education) which makes rules or determines contested cases.

(6) Allocations--For all retail public utilities, the division of plant, revenues, expenses, taxes, and reserves between municipalities, or between municipalities and unincorporated areas, where such items are used for providing water or sewer utility service in a municipality or for a municipality and unincorporated areas.

(7) Base rate--The portion of a consumer's utility bill which is paid for the opportunity of receiving utility service, excluding stand-by fees, which does not vary due to changes in utility service consumption patterns.

(8) Billing period--The usage period between meter reading dates for which a bill is issued or in nonmetered situations, the period between bill issuance dates.

(9) Certificate--The definition of certificate is that definition given to certificate of convenience and necessity in this subchapter.

(10) Certificate of Convenience and Necessity--A permit issued by the commission which authorizes and obligates a retail public utility to furnish, make available, render, or extend continuous and adequate retail water or sewer utility service to a specified geographic area.

(11) Certificate of Public Convenience and Necessity--The definition of certificate of public convenience and necessity is that definition given to certificate of convenience and necessity in this subchapter.

(12) Class of service or customer class--A description of utility service provided to a customer which denotes such characteristics as nature of use or type of rate.

(13) Code--The Texas Water Code.

(14) Corporation--Any corporation, joint-stock company, or association, domestic or foreign, and its lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers and privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations unless expressly provided otherwise in the Texas Water Code.

(15) Customer--Any person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency provided with services by any retail public utility.

(16) Customer service line or pipe--The pipe connecting the water meter to the customer's point of consumption or the pipe which conveys sewage from the customer's premises to the service provider's service line.

(17) Facilities--All the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.

(18) Incident of tenancy--Water or sewer service, provided to tenants of rental property, for which no separate or additional service fee is charged other than the rental payment.

(19) Landowner--An owner or owners of a tract of land including multiple owners of a single deeded tract of land as shown on the appraisal roll of the appraisal district established for each county in which the property is located.

(20) License--The whole or part of any commission permit, certificate, registration, or similar form of permission required by law.

(21) Licensing--The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license, certificates of convenience and necessity, or any other authorization granted by the commission in accordance with its authority under the Texas Water Code.

(22) Main--A pipe operated by a utility service provider that is used for transmission or distribution of water or to collect or transport sewage.

(23) Mandatory water use reduction--The temporary reduction in the use of water imposed by court order, government agency, or other authority with appropriate jurisdiction. This does not include water conservation measures that seek to reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling or reuse of water so that a water supply is made available for future or alternative uses.

(24) Member--A person who holds a membership in a water supply or sewer service corporation and who is a record owner of a fee simple title to property in an area served by a water supply or sewer service corporation, or a person who is granted a membership and who either currently receives or will be eligible to receive water or sewer utility service from the corporation. In determining member control of a water supply or sewer service corporation, a person is entitled to only one vote regardless of the number of memberships the person owns.

(25) Membership fee--A fee assessed each water supply or sewer service corporation service applicant that entitles the applicant to one connection to the water or sewer main of the corporation. The amount of the fee is generally defined in the corporation's bylaws and payment of the fee provides for issuance of one membership certificate in the name of the applicant, for which certain rights, privileges, and obligations are allowed under said bylaws. For purposes of Texas Water Code, §13.043(g), a membership fee is a fee not exceeding approximately 12 times the monthly base rate for water or sewer service or an amount that does not include any materials, labor, or services required for or provided by the installation of a metering device for the delivery of service, capital recovery, extension fees, buy-in fees, impact fees, or contributions in aid of construction.

(26) Municipality--A city, existing, created, or organized under the general, home rule, or special laws of this state.

(27) Municipally owned utility--Any retail public utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(28) Person--Any natural person, partnership, cooperative corporation, association, or public or private organization of any character other than an agency or municipality.

(29) Physician--Any public health official, including, but not limited to, medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official.

(30) Point of use or point of ultimate use--The primary location where water is used or sewage is generated; for example, a residence or commercial or industrial facility.

(31) Potable water--Water that is used for or intended to be used for human consumption or household use.

(32) Premises--A tract of land or real estate including buildings and other appurtenances thereon.

(33) Public utility--The definition of public utility is that definition given to water and sewer utility in this subchapter.

(34) Purchased sewage treatment--Sewage treatment purchased from a source outside the retail public utility's system to meet system requirements.

(35) Purchased water--Raw or treated water purchased from a source outside the retail public utility's system to meet system demand requirements.

(36) Rate--Includes every compensation, tariff, charge, fare, toll, rental, and classification or any of them demanded, observed, charged, or collected, whether directly or indirectly, by any retail public utility, or water or sewer service supplier, for any service, product, or commodity described in Texas Water Code, §13.002(23), and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

(37) Ratepayer--Each person receiving a separate bill shall be considered as a ratepayer, but no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. A complaint or a petition for review of a rate change shall be considered properly signed if signed by any person, or spouse of any such person, in whose name utility service is carried.

(38) Reconnect fee--A fee charged for restoration of service where service has previously been provided. It may be charged to restore service after disconnection for reasons listed in §291.88 of this title (relating to Discontinuance of Service) or to restore service after disconnection at the customer's request.

(39) Retail public utility--Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

(40) Retail water or sewer utility service--Potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

(41) Safe drinking water revolving fund--The fund established by the Texas Water Development Board to provide financial assistance in accordance with the federal program established under the provisions of the Safe Drinking Water Act and as defined in Texas Water Code, §15.602.

(42) Service--Any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under the Texas Water Code to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

(43) Service line or pipe--A pipe connecting the utility service provider's main and the water meter or for sewage, connecting the main and the point at which the customer's service line is connected, generally at the customer's property line.

(44) Sewage--Ground garbage, human and animal, and all other waterborne type waste normally disposed of through the sanitary drainage system.

(45) Standby fee--A charge imposed on unimproved property for the availability of water or sewer service when service is not being provided.

(46) Tap fee--A tap fee is the charge to new customers for initiation of service where no service previously existed. A tap fee for water service may include the cost of physically tapping the water main and installing meters, meter boxes, fittings, and other materials and labor. A tap fee for sewer service may include the cost of physically tapping the main and installing the utility's service line to the customer's property line, fittings, and other material and labor. Water or sewer taps may include setting up the new customer's account, and allowances for equipment and tools used. Extraordinary expenses such as road bores and street crossings and grinder pumps may be added if noted on the utility's approved tariff. Other charges, such as extension fees, buy-in fees, impact fees, or contributions in aid of construction (CIAC) are not to be included in a tap fee.

(47) Tariff--The schedule of a retail public utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the retail public utility stated separately by type or kind of service and the customer class.

(48) Temporary water rate provision--A provision in a utility's tariff that allows a utility to adjust its rates in response to mandatory water use reduction.

(49) Test year--The most recent 12-month period for which representative operating data for a retail public utility are available. A utility rate filing must be based on a test year that ended less than 12 months before the date on which the utility made the rate filing.

(50) Utility--The definition of utility is that definition given to water and sewer utility in this subchapter.

(51) Water and sewer utility--Any person, corporation, cooperative corporation, affected county, or any combination of those persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the production, transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.

(52) Water use restrictions--Restrictions implemented to reduce the amount of water that may be consumed by customers of the system due to emergency conditions or drought.

(53) Water supply or sewer service corporation--Any nonprofit corporation organized and operating under Texas Water Code, Chapter 67, that provides potable water or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold. For purposes of this chapter, to qualify as member-owned, member-controlled a water supply or sewer service corporation must also meet the following conditions.

(A) All members of the corporation meet the definition of "member" under this section, and all members are eligible to vote in those matters specified in the articles and bylaws of the corporation. Payment of a membership fee in addition to other conditions of service may be required provided that all members have paid or are required to pay the membership fee effective at the time service is requested.

(B) Each member is entitled to only one vote regardless of the number of memberships owned by that member.

(C) A majority of the directors and officers of the corporation must be members of the corporation.

(D) The corporation's by-laws include language indicating that the factors specified in subparagraphs (A) - (C) of this paragraph are in effect.

(54) Wholesale water or sewer service--Potable water or sewer service, or both, provided to a person, political subdivision, or municipality who is not the ultimate consumer of the service.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803188
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER B. RATES, RATE MAKING, AND RATES/TARIFF CHANGES

30 TAC §291.21

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out its duties under the TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. Finally, TWC, §13.188 mandates that the commission shall adopt a procedure allowing a utility to file an application with the commission to timely adjust the utility's rates to reflect an increase or decrease in documented energy costs.

The adopted amendment implements TWC, §13.147 and §13.188.

§291.21. Form and Filing of Tariffs.

(a) Approved tariff. A utility may not directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in its approved tariff filed with the commission or with the municipality exercising original jurisdiction over the utility, except as noted in this subsection. A utility may charge the rates proposed under Texas Water Code (TWC), §13.187(a) (relating to Statement of Intent to Change Rates) after the proposed effective date, unless the rates are suspended or the commission or a judge sets interim rates. The regulatory assessment required in TWC, §5.235(n) does not have to be listed on the utility's approved tariff to be charged and collected but must be included in the tariff at the earliest opportunity. A person who possesses facilities used to provide water utility service or a utility that holds a certificate of public convenience and necessity to provide water service that enters into an agreement in accordance with TWC, §13.250(b)(2), may collect charges for wastewater services on behalf of another retail public utility on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement. A utility may enter into a contract with a county to collect solid waste disposal fees and include those fees on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(b) Requirements as to size, form, identification, minor changes, and filing of tariffs.

(1) Tariffs filed with applications for certificates of convenience and necessity.

(A) Every public utility shall file with the commission the number of copies of its tariff required in the application form containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility service when it applies for a certificate of convenience and necessity to operate as a public utility. The tariff must be on the form the commission prescribes or another form acceptable to the commission.

(B) Every water supply or sewer service corporation shall file with the commission the number of copies of its tariff required in the application form containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility service when it applies for a certificate of convenience and necessity to operate as a retail public utility.

(2) Minor tariff changes. Except for an affected county, a public utility's approved tariff may not be changed or amended without commission approval. An affected county may change rates for water or wastewater service without commission approval but shall file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The executive director may approve the following minor changes to tariffs:

(i) service rules and policies;

(ii) changes in fees for customer deposits, meter tests, return check charges, and late charges, provided they do not exceed the maximum allowed by the applicable sections;

(iii) implementation of a purchased water or sewage treatment provision, a temporary water rate provision in response to mandatory reductions in water use imposed by a court, government agency, or other authority, or water use fee provision previously approved by the commission;

(iv) surcharges over a time period determined by the executive director to reflect the change in the actual cost to the utility for sampling costs, commission inspection fees, or at the discretion of the executive director, other governmental requirements beyond the utility's control;

(v) addition of the regulatory assessment as a separate item or to be included in the currently authorized rate;

(vi) addition of a provision allowing a utility to collect wastewater charges in accordance with TWC, §13.250(b)(2) or §13.147(d);

(vii) rate adjustments to implement authorized phased or multi-step rates or downward rate adjustments to reconcile rates with actual costs;

(viii) addition of a production fee charged by a groundwater conservation district as a separate item calculated by multiplying the customer's total consumption, including the number of gallons in the base bill, by the actual production fee per thousand gallons; or

(ix) implementation of an energy cost adjustment clause.

(B) The addition of an extension policy to a tariff or a change to an existing extension policy does not qualify as a minor tariff change because it must be approved or amended in a rate change application.

(3) Tariff revisions and tariffs filed with rate changes. The utility shall file three copies of each revision or in the case of a rate change, the number required in the application form. Each revision must be accompanied by a cover page that contains a list of pages being revised, a statement describing each change, its effect if it is a change in an existing rate, and a statement as to impact on rates of the change by customer class, if any. If a proposed tariff revision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

(4) Rate schedule. Each rate schedule must clearly state the territory, subdivision, city, or county in which the schedule is applicable.

(5) Tariff sheets. Tariff sheets must be numbered consecutively. Each sheet must show an effective date, a revision number, section number, sheet number, name of the utility, the name of the tariff, and title of the section in a consistent manner. Sheets issued under new numbers must be designated as original sheets. Sheets being revised must show the number of the revision, and the sheet numbers must be the same.

(c) Composition of tariffs. A utility's tariff, including those utilities operating within the corporate limits of a municipality, must contain sections setting forth:

(1) a table of contents;

(2) a list of the cities and counties, and subdivisions or systems, in which service is provided;

(3) the certificate of convenience and necessity number under which service is provided;

(4) the rate schedules;

(5) the service rules and regulations, including forms of the service agreements, if any, and customer service inspection forms required to be completed under §290.46(j) of this title (relating to Minimum Acceptable Operating Practices for Public Drinking Water Sys-

tems) if the form used deviates from that specified in §290.47(d) of this title (relating to Appendices);

(6) the extension policy;

(7) an approved drought contingency plan as required by §288.20 of this title (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers); and

(8) the form of payment to be accepted for utility services.

(d) Tariff filings in response to commission orders. Tariff filings made in response to an order issued by the commission must include a transmittal letter stating that the tariffs attached are in compliance with the order, giving the application number, date of the order, a list of tariff sheets filed, and any other necessary information. Any service rules proposed in addition to those listed on the commission's model tariff or any modifications of a rule in the model tariff must be clearly noted. All tariff sheets must comply with all other sections in this chapter and must include only changes ordered. The effective date and/or wording of the tariffs must comply with the provisions of the order.

(e) Availability of tariffs. Each utility shall make available to the public at each of its business offices and designated sales offices within Texas all of its tariffs currently on file with the commission or regulatory authority, and its employees shall lend assistance to persons requesting information and afford these persons an opportunity to examine any of such tariffs upon request. The utility also shall provide copies of any portion of the tariffs at a reasonable cost to reproduce such tariff for a requesting party.

(f) Rejection. Any tariff filed with the commission and found not to be in compliance with this section must be so marked and returned to the utility with a brief explanation of the reasons for rejection.

(g) Change by other regulatory authorities. Tariffs must be filed to reflect changes in rates or regulations set by other regulatory authorities and must include a copy of the order or ordinance authorizing the change. Each utility operating within the corporate limits of a municipality exercising original jurisdiction shall file with the commission a copy of its current tariff that has been authorized by the municipality.

(h) Purchased water or sewage treatment provision.

(1) A utility that purchases water or sewage treatment may include a provision in its tariff to pass through to its customers changes in such costs. The provision must specify how it is calculated and affects customer billings.

(2) This provision must be approved by the commission in a rate proceeding. A proposed change in the method of calculation of the provision must be approved in a rate proceeding.

(3) Once the provision is approved, any revision of a utility's billings to its customers to allow for the recovery of additional costs under the provision may be made only upon issuing notice as required by paragraph (4) of this subsection. The executive director's review of a proposed revision is an informal proceeding. Only the commission, the executive director, or the utility may request a hearing on the proposed revision. The recovery of additional costs is defined as an increase in water use fees or in costs of purchased water or sewage treatment.

(4) A utility that wishes to revise utility billings to its customers pursuant to an approved purchased water or sewer treatment or water use fee provision to allow for the recovery of additional costs shall take the following actions prior to the beginning of the billing period in which the revision takes effect:

(A) submit a written notice to the executive director; and

(B) mail notice to the utility's customers. Notice may be in the form of a billing insert and must contain the effective date of the change, the present calculation of customer billings, the new calculation of customer billings, and the change in charges to the utility for purchased water or sewage treatment or water use fees. The notice must include the following language: "This tariff change is being implemented in accordance with the utility's approved (purchased water) (purchased sewer) (water use fee) adjustment clause to recognize (increases) (decreases) in the (water use fee) (cost of purchased) (water) (sewage treatment). The cost of these charges to customers will not exceed the (increased) (decreased) cost of (the water use fee) (purchased) (water) (sewage treatment)."

(5) Notice to the commission must include a copy of the notice sent to the customers, proof that the cost of purchased water or sewage treatment has changed by the stated amount, and the calculations and assumptions used to determine the new rates.

(6) Purchased water or sewage treatment provisions may not apply to contracts or transactions between affiliated interests.

(i) Effective date. The effective date of a tariff change is the date of approval by the executive director unless otherwise stated in the letter transmitting the approval or the date of approval by the commission, unless otherwise specified in a commission order or rule. The effective date of a proposed rate increase under TWC, §13.187 is the proposed date on the notice to customers and the commission, unless suspended and must comply with the requirements of §291.8(b) of this title (relating to Administrative Completeness).

(j) Tariffs filed by water supply or sewer service corporations. Every water supply or sewer service corporation shall file, for informational purposes only, one copy of its tariff showing all rates that are subject to the appellate jurisdiction of the commission and that are in force for any utility service, product, or commodity offered. The tariff must include all rules and regulations relating to or affecting the rates, utility service or extension of service or product, or commodity furnished and shall specify the certificate of convenience and necessity number and in which counties or cities it is effective.

(k) Surcharge.

(1) A surcharge is an authorized rate to collect revenues over and above the usual cost of service.

(2) If specifically authorized for the utility in writing by the executive director or the municipality exercising original jurisdiction over the utility, a surcharge to recover the actual increase in costs to the utility may be collected over a specifically authorized time period without being listed on the approved tariff for:

(A) sampling fees not already included in rates;

(B) inspection fees not already included in rates;

(C) production fees or connection fees not already included in rates charged by a groundwater conservation district; or

(D) other governmental requirements beyond the control of the utility.

(3) A utility shall use the revenues collected pursuant to a surcharge only for the purposes noted and handle the funds in the manner specified according to the notice or application submitted by the utility to the commission, unless otherwise directed by the executive director. The utility may redirect or use the revenues for other purposes only after first obtaining the approval of the executive director.

(l) Temporary water rate.

(1) A utility's tariff may include a temporary water rate provision that will allow the utility to increase its retail customer rates during periods when a court, government agency, or other authority orders mandatory water use reduction measures that affect the utility customer' use of water service and the utility's water revenues. Implementation of the temporary water rate provision will allow the utility to recover from customers revenues that the utility would otherwise have lost due to mandatory water use reductions in accordance with the temporary water rate provision approved by the commission. If a utility obtains a portion of its water supply from another unrestricted water source or water supplier during the time the temporary water rate is in effect, the rate resulting from implementation of the temporary water rate provision must be adjusted to account for the supplemental water supply and to limit over-recovery of revenues from customers. A temporary water rate provision may not be implemented by a utility if there exists an available, unrestricted, alternative water supply that the utility can use to immediately replace, without additional cost, the water made unavailable because of the action requiring a mandatory reduction of use of the affected water supply.

(2) The temporary water rate provision must be approved by the commission in a rate proceeding before it may be included in the utility's approved tariff or implemented as provided in this subsection. A proposed change in the temporary water rate must be approved in a rate proceeding. A utility that has filed a rate change within the last 12 months may file a request for the limited purpose of obtaining a temporary water rate provision.

(3) A utility may request a temporary water rate provision using the formula in this paragraph to recover 50% or less of the revenues that would otherwise have been lost due to mandatory water use reductions through a limited rate proceeding. The formula for a temporary water rate provision under this paragraph is:
Figure: 30 TAC §291.21(l)(3) (No change.)

(A) The utility shall file a temporary water rate application prescribed by the executive director and provide customer notice as required in the application, but is not required to provide complete financial data to support its existing rates. Notice must include a statement of when the temporary water rate provision would be implemented, the classes of customers affected, the rates affected, information on how to protest the rate change, the required number of protests to ensure a hearing, the address of the commission, the time frame for protests, and any other information that is required by the executive director in the temporary water rate application. The utility's existing rates are not subject to review in the proceeding and the utility is only required to support the need for the temporary rate. A request for a temporary water rate provision under this paragraph is not considered a statement of intent to increase rates subject to the 12-month limitation in §291.23 of this title (relating to Time between Filings).

(B) The utility shall establish that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect.

(4) A utility may request a temporary water rate provision using the formula in paragraph (3) of this subsection or any other method acceptable to the commission to recover up to 100% of the revenues that would otherwise have been lost due to mandatory water use reductions.

(A) If the utility requests authorization to recover more than 50% of lost revenues, it shall submit financial data to support its existing rates as well as the temporary water rate provision even if no other rates are proposed to be changed. The utility shall complete a rate application and provide notice in accordance with the requirements of §291.22 of this title (relating to Notice of Intent To Change Rates). The utility's existing rates are subject to review in addition to the temporary water rate provision.

(B) The utility shall establish that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect; that the rate of return granted by the commission in the utility's last rate case does not adequately compensate the utility for the foreseeable risk that mandatory water use reductions will be ordered; and that revenues generated by existing rates do not exceed reasonable cost of service.

(5) The utility may place the temporary water rate into effect only after:

(A) the temporary water provision has been approved by the commission and included in the utility's approved tariff in a prior rate proceeding;

(B) there is an action by a court, government agency, or other authority requiring mandatory water use reduction measures that affect the utility's customers' use of utility services; and

(C) issuing notice as required by paragraph (7) of this subsection.

(6) The utility may readjust its rates using the temporary water rate provision as necessary to respond to modifications or changes to the original order requiring mandatory water use reductions by reissuing notice as required by paragraph (7) of this subsection. The executive director's review of the proposed implementation of an approved temporary water rate provision is an informal proceeding. Only the commission, the executive director, or the utility may request a hearing on the proposed implementation.

(7) A utility that wishes to place a temporary water rate into effect shall take the following actions prior to the beginning of the billing period in which the temporary water rate takes effect:

(A) submit a written notice, including a copy of the notice received from the court, government agency, or other authority requiring the reduction in water use, to the executive director; and

(B) mail notice to the utility's customers. Notice may be in the form of a billing insert and must contain the effective date of the implementation and the new rate the customers will pay after the temporary water rate is implemented. The notice must include the following language: "This rate change is being implemented in accordance with the temporary water rate provision approved by the Texas Commission on Environmental Quality to recognize the loss of revenues due to mandatory water use reduction ordered by (name of entity issuing order). The new rates will be effective on (date) and will remain in effect until the mandatory water use reductions are lifted or expired. The purpose of the rate is to ensure the financial integrity of the utility. The utility will recover through the rate (the percentage authorized by the temporary rate) % of the revenues the utility would otherwise have lost due to mandatory water use reduction by increasing the volume charge from ($ per 1,000 gallons to $ per 1,000 gallons)."

(8) A utility shall stop charging a temporary water rate as soon as is practical after the order that required mandatory water use reduction is ended, but in no case later than the end of the billing period that was in effect when the order was ended. The utility shall notify its customers of the date that the temporary water rate ends and that its

rates will return to the level authorized before the temporary water rate was implemented.

(9) If the commission initiates an inquiry into the appropriateness or the continuation of a temporary water rate, it may establish the effective date of its decision on or after the date the inquiry is filed.

(m) Multiple system consolidation. Except as otherwise provided in subsection (o) of this section, a utility may consolidate its tariff and rate design for more than one system if:

(1) the systems included in the tariff are substantially similar in terms of facilities, quality of service, and cost of service; and

(2) the tariff provides for rates that promote water conservation for single-family residences and landscape irrigation.

(n) Regional rates. The commission, where practicable, shall consolidate the rates by region for applications submitted with a consolidated tariff and rate design for more than one system.

(o) Exemption. Subsection (m) of this section does not apply to a utility that provided service in only 24 counties on January 1, 2003.

(p) Energy cost adjustment clause.

(1) A utility that purchases energy (electricity or natural gas) that is necessary for the provision of water or sewer service may request the inclusion of an energy cost adjustment clause in its tariff to allow the utility to adjust its rates to reflect increases and decreases in documented energy costs.

(2) A utility that requests the inclusion of an energy cost adjustment clause in its tariff shall file an application with the executive director. The utility shall also give notice of the proposed energy cost adjustment clause by mail, either separately or accompanying customer billings, or by hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Proof of notice in the form of an affidavit stating that proper notice was mailed to affected customers and stating the dates of such mailing shall be filed with the commission by the applicant utility as part of the application. Notice must be provided on the notice form included in the commission's application package and must contain the following information:

(A) the utility name and address, a description of how the increase or decrease in energy costs will be calculated, the effective date of the proposed change, and the classes of utility customers affected. The effective date of the proposed energy cost adjustment clause must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the clause may not apply to service received before the effective date of the clause;

(B) information on how to submit comments regarding the energy cost adjustment clause, the address of the commission, and the time frame for comments; and

(C) any other information that is required by the executive director in the application form.

(3) The executive director's review of the utility's application is an uncontested matter not subject to a contested case hearing. However, the executive director shall hold an uncontested public meeting on the application if requested by a member of the legislature who represents the area served by the utility or if the executive director determines that there is substantial public interest in the matter.

(4) Once an energy cost adjustment clause has been approved, documented changes in energy costs must be passed through to the utility's customers within a reasonable time. The pass through, whether an increase or decrease, shall be implemented on at least an annual basis, unless the executive director determines a special circumstance applies. Anytime changes are being made using this provision, notice shall be provided as required by paragraph (5) of this subsection.

(5) Before a utility implements a change in its energy cost adjustment clause as required by paragraph (4) of this subsection, the utility shall take the following actions prior to the beginning of the billing period in which the implementation takes effect:

(A) submit written notice to the executive director, which must include a copy of the notice sent to the customers, proof that the documented energy costs have changed by the stated amount; and

(B) mail either separately or accompanying customer billings, or hand deliver notice to the utility's affected customers. Notice must contain the effective date of change and the increase or decrease in charges to the utility for documented energy costs. The notice must include the following language: "This tariff change is being implemented in accordance with the utility's approved energy cost adjustment clause to recognize (increases) (decreases) in the documented energy costs. The cost of these charges to customers will not exceed the (increase) (decrease) in documented energy costs."

(6) The executive director may suspend the adoption or implementation of an energy cost adjustment clause if the utility has failed to properly complete the application or has failed to comply with the notice requirements or proof of notice requirements. If the utility cannot clearly demonstrate how the clause is calculated, the increase or decrease in documented energy costs or how the increase or decrease in documented energy costs will affect rates, the executive director may suspend the adoption or implementation of the clause until the utility provides additional documentation requested by the executive director. If the executive director suspends the adoption or implementation of the clause, the adoption or implementation will be effective on the date specified by the executive director.

(7) Energy cost adjustment clauses may not apply to contracts or transactions between affiliated interests.

(8) A proceeding under this subsection is not a rate case, and TWC, §13.187 does not apply.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803189
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 239-2548

SUBCHAPTER C. RATE-MAKING APPEALS

30 TAC §291.41

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out its duties under the TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the

TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The adopted amendment implements TWC, §49.2122.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803190
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER E. CUSTOMER SERVICE AND PROTECTION

30 TAC §291.87, §291.88

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out its duties under the TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The adopted amendments implement TWC, §13.147 and Local Government Code, §402.911.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803191
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER G. CERTIFICATES OF CONVENIENCE AND NECESSITY

30 TAC §§291.101, 291.105, 291.113

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out its duties under the TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The adopted amendments implement TWC, §13.2451 and Local Government Code, §402.017.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803192
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

CHAPTER 305. CONSOLIDATED PERMITS

SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.72

The Texas Commission on Environmental Quality (commission or agency) adopts an amendment to §305.72 *without changes* to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2230) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking amends §305.72 in order to implement House Bill (HB) 2654, 80th Legislature, 2007, and its amendments to Texas Water Code (TWC), §27.021. HB 2654 removed the requirement for a contested case hearing under the provisions of TWC, §27.018 for Class I injection wells that dispose of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals. HB 2654 does

not exclude Class I injection wells for the disposal of any other waste streams from the requirement to provide an opportunity for a contested case hearing.

The purpose of this rulemaking is to subject permit amendments to the opportunity for a contested case hearing when the amendment is to a Class I injection well permit authorizing only disposal of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals and the amendment requests authority to dispose of other types of wastes. The rulemaking specifies that a permit for a Class I injection well used only for the disposal of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals may not be administratively modified, under §305.72(b)(4), in order to add waste streams disposed in the Class I injection well other than nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals. A permit change to dispose of other types of wastes will require a major amendment under §305.62(c)(1)(A), which provides an opportunity for a contested case hearing. This rulemaking ensures that the hearing requirements of TWC, §27.018 for conventional Class I injection well permits will be retained after a permit is issued under the provisions of HB 2654.

Amendments to 30 TAC Chapters 50, 55 and 331 are also adopted in this issue of the *Texas Register* to implement HB 2654 and to incorporate other changes to facilitate disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals.

SECTION DISCUSSION

§305.72. Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee.

This rulemaking amends §305.72(b)(4) to specify that the kind of permit modification allowed to a conventional Class I injection well permit by this paragraph shall not include modifying a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals to a conventional Class I injection well permit. This amendment effectively precludes a permit holder for this type of Class I injection well (used only for the disposal of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals) from adding other types of waste streams without providing the opportunity for a contested case hearing.

The commission adopts an administrative change in §305.72(b)(4) to correct the spelling of "judgement" to "judgment."

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not intended to reduce risks to human health from environmental exposure, nor does it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The intent of this rulemaking is to implement HB 2654, passed during the 80th Legislature, 2007, and to revise criteria for authorizing Class I nonhazardous wells injecting desalination concentrate and other water treatment residuals from public water systems so that the state's rules are no more stringent than federal Class I nonhazardous injection well regulations. The specific intent of the amendment to §305.72 is to protect the opportunity for a contested case hearing when a permittee proposes to add a type of waste other than desalination concentrate or drinking water treatment residuals to those permitted to be injected to its Class I injection well and the permit was issued without the opportunity for a contested case hearing. The rule substantially advances this purpose by providing that a minor modification shall not be used to add a waste stream other than desalination concentrate or drinking water treatment residuals to the permit of a Class I injection well issued without the opportunity for a contested case hearing.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the amendment would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the amendment will be significant with respect to the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking does not exceed any standard set by federal law but rather amends the rules so that they are no more stringent or restrictive than the federal regulations. The adopted rule does not exceed the requirements of state law under the TWC, Chapter 27. Further, the adopted rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program. Finally, the rule is not adopted solely under the general powers of the agency, but rather specifically under TWC, §27.023(m), which allows the commission to adopt rules to implement the general permit authorizing use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals and TWC, §27.109, which authorizes the commission to adopt rules to implement TWC, Chapter 27 (regarding Injection Wells), as well as the other general powers of the agency.

The commission invited public comment regarding the regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the amendment to Chapter 305 and performed a preliminary assessment of whether the amendment would constitute a taking under Texas Government Code, Chapter 2007. The primary purposes of the amendment are to implement HB 2654 and correct a misspelling identified during review of the rule language. The amendment would substantially advance these purposes by amending §305.72 to ensure that additional waste streams shall not be added as minor modifications to a Class I injection well permitted in such a manner that no opportunity exists for a contested case hearing, and by changing the spelling of "judgement" to "judgment."

Promulgation and enforcement of the amendment would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rule because the amendment neither relates to, nor has any impact on the use or enjoyment of private real property, and there would be no reduction in property value as a result of this rule. Therefore, the adopted rule would not constitute a taking under Texas Government Code, Chapter 2007.

The commission has no reasonable alternative that could accomplish the specific purpose of ensuring that additional waste streams are not added as minor modifications to a Class I injection well permitted in such a manner that no opportunity exists for a contested case hearing. Without the amendment, a Class I injection well for disposal of only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals could be permitted under an individual permit or other authorization not requiring a contested case hearing, then add another waste stream as a minor modification without the public ever having an opportunity to contest the additional waste stream through the contested case hearing process.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rule is not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The proposal was published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2230). The commission held a public hearing in Austin on April 8, 2008. The comment period closed on April 14, 2008. No comments pertaining to the proposed amendment to Chapter 305 were received.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803199
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amendments to §§331.2, 331.7, 331.17, 331.42, 331.45, 331.46, 331.62 - 331.66, and 331.121 and new §§331.201 - 331.206 *without changes* to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2236) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking supports the commission's role in promoting desalination projects and is intended to facilitate permitting of Class I wells to be used for disposal of nonhazardous desalination concentrate and other nonhazardous water treatment residuals from public water systems and to reduce operating costs for these wells. This project is in response to initiatives by the Governor's Office and the Texas Water Development Board to promote desalination technology in Texas and to address the need for public water supply systems to dispose of drinking water treatment residuals.

This rulemaking implements House Bill (HB) 2654, 80th Legislature, 2007 and amends technical standards to expand disposal options for the special case of nonhazardous brine from a desalination operation (desalination concentrate) and nonhazardous drinking water treatment residuals. HB 2654 allows the commission to issue a general permit to authorize the use of a Class I injection well to dispose of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. A single statewide general permit covering all qualifying Class I injection wells that meet the permit's performance standards for injection of nonhazardous desalination concentrate and other nonhazardous drinking water treatment residuals will expedite the processing of authorizations for wells used for these purposes. The general permit will require safeguards to protect groundwater and surface water.

The use of a general permit to authorize Class I wells for disposal of desalination concentrate and other water treatment residuals from public water systems will reduce commission staff time required to perform detailed administrative and technical reviews of individual permit applications. For projects that do not meet the criteria for the general permit, the commission will be able

to conduct streamlined reviews of applications for Class I nonhazardous wells for the disposal of desalination concentrate and other water treatment residuals from public water systems. Under current rules, injection of nonhazardous desalination concentrate and other nonhazardous water treatment residuals from public water systems is limited to individually-permitted Class I wells, Class II wells dually permitted as Class I wells, or under special conditions, rule-authorized Class V wells. Other options for disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals include evaporation ponds and surface discharge under a Texas Pollutant Discharge Elimination System permit.

Entities disposing of desalination concentrate and other water treatment residuals from public water systems in Class I nonhazardous waste disposal wells and Class I/Class II dually permitted wells will be the primary beneficiaries of this rulemaking. This rulemaking will benefit the public by facilitating the production of public water supplies via desalination. Public water systems that must treat water to meet standards for constituent levels and dispose of the residuals will also benefit. Residents and property owners adjacent to disposal sites may be affected by this rule. This rulemaking may require submittal of an Underground Injection Control (UIC) Program revision to the United States Environmental Protection Agency in order to explain new processes under the adopted rules and future general permit.

HB 2654 also authorizes the use of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes without first obtaining a permit from the commission (consistent with federal regulations). Prior to this legislation, enhanced oil recovery wells needed permits from both the commission and the Railroad Commission of Texas (Class II wells).

In addition to implementing HB 2654, this rulemaking amends Chapter 331 to create a set of criteria closely analogous to federal Class I nonhazardous injection well regulations for the special case of wells injecting nonhazardous desalination concentrate and other nonhazardous water treatment residuals from public water systems. Currently in Texas the technical standards for Class I hazardous and nonhazardous wells are substantially the same; however, federal Class I standards for nonhazardous waste wells are less stringent. In conjunction with HB 2654, the revised technical standards will facilitate the use of injection wells for these purposes while meeting federal standards.

To implement HB 2654, this rulemaking amends §§331.2, 331.7 and 331.17 and adds new Subchapter L, General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals. To create a set of criteria closely analogous to federal Class I nonhazardous injection well regulations for the special case of wells injecting nonhazardous desalination concentrate and other nonhazardous water treatment residuals from public water systems, §§331.42, 331.45, 331.46, 331.62 - 331.66 and 331.121 are amended. To allow an injection well, authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes without a permit from the commission, §331.7 is amended. The amendment to §331.7 also stipulates that, in this context, radioactive material is subject to the applicable requirements of 30 TAC Chapter 336.

Amendments to 30 TAC Chapters 50, 55, and 305 are also adopted in this issue of the *Texas Register* to implement HB 2654.

SECTION BY SECTION DISCUSSION

The commission amends §331.2, Definitions, to add the following eight definitions. These definitions are necessary to characterize new terminology used in HB 2654 that does not currently appear in connection with Class I wells in Chapter 331. Desalination concentrate, is added as new paragraph (30). Drinking water treatment residuals, is added as new paragraph (35). Enhanced oil recovery project (EOR), is added as new paragraph (37). General permit, is added as new paragraph (44). Individual permit, is added as new paragraph (49). Notice of change (NOC), and Notice of intent (NOI), are added as new paragraphs (71) and (72), respectively. Public water system, is added as new paragraph (84). The commission is renumbering the definitions in §331.2 as a result of the added definitions. Current paragraph (34) is renumbered as paragraph (36); current paragraphs (35) - (40) are renumbered as paragraphs (38) - (43), respectively; current paragraphs (41) - (44) are renumbered as paragraphs (45) - (48), respectively; current paragraphs (45) - (65) are renumbered as paragraphs (50) - (70), respectively; current paragraphs (66) - (76) are renumbered as paragraphs (73) - (83), respectively; current paragraphs (77) - (104) are renumbered as paragraphs (85) - (112), respectively.

Section 331.7, Permit Required, is amended as follows: subsection (a) is amended to include subsections (e) and (f) as exceptions to the requirement that all injection wells and activities must be authorized by an individual permit. The word "permit" is changed to "individual permit" to clarify that §331.7(a) pertains to an individual permit versus the general permit. Subsection (d) is revised to exclude pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals from the option to be authorized by registration. HB 2654 does not explicitly mention pre-injection units, and the commission plans to address pre-injection units in the general permit. Consistent with federal requirements, no special authorization for pre-injection units associated with these wells will be required. Pre-injection units may also be authorized under an individual permit, such as a Class I UIC permit, or under 30 TAC Chapter 290. Chapter 290 addresses the construction of facilities associated with water treatment. Adopted subsection (e) is added to authorize the commission to issue a general permit for the use of a Class I injection well to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. If the commission determines that the general permit will not protect ground and surface fresh water from pollution, the commission may require that an injection well and the injection activities be regulated under an individual permit. Adopted subsection (f) is added to stipulate that an injection well authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes does not require a permit from the commission.

Section 331.17(a), Pre-injection Units Registration, is amended to exclude pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals from the option to be authorized by registration. HB 2654 does not explicitly mention pre-injection units, and the commission plans to address pre-injection units in the general permit. Consistent with federal requirements,

no special authorization for pre-injection units will be required for units associated with these wells. This change is made in conjunction with the amendment of §331.7(d).

The amendment to §331.42, Area of Review, substantively affects subsections (a) - (c). The purpose of these changes is to specify standards for the extent of the area of review that are substantially equivalent to federal standards for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals.

In §331.42(a), the contents of existing §331.42(b)(1) - (4) are incorporated as new paragraphs (1) and (3) - (5). This reformatting groups the area of review requirements for different types and classes of wells under existing §331.42(a). Existing §331.42(b) is relabeled as §331.42(a)(1) and amended to exclude wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals from the area of review requirement for other types of Class I wells. Adopted §331.42(a)(2) is added to specify that the area of review for wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals is a radius of 1/4 mile from the proposed or existing wellbore, or the area within the cone of influence, whichever is greater. This new paragraph further stipulates that the radius of an area of review determined by the mathematical model stated in §331.42(b) is permissible even if it is less than 1/4 mile. The contents of existing §331.42(b)(2) - (4) are incorporated under §331.42(a) as paragraphs (3) - (5). Existing subsection (c), which contains a mathematical equation, is relabeled as subsection (b), and editorial changes are made at two places in the equation to replace an erroneous paragraph symbol (¶) with the Greek letter pi (π). Existing subsection (d) is relabeled as subsection (c) and amended to exclude wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals from the requirement for a minimum radius of 2-1/2 miles for the area of review. Existing subsection (e) is relabeled as subsection (d).

The commission amends §331.45(1) to exclude wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals from certain standards for construction and completion of the well that exceed federal standards for Class I nonhazardous waste wells. New language has been added to §331.45(2) to stipulate standards substantially equivalent to federal standards for construction and completion of Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Paragraphs (2) and (3) have been renumbered as paragraphs (3) and (4).

Section 331.46, Closure Standards, is amended to add new subsection (a), stating which of current subsections (a) - (p) of §331.46 apply to Class I wells, salt cavern disposal wells, and Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. The purpose of these changes is to specify closure standards that are substantially equivalent to federal standards for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (a) has been relabeled as subsection (b), and subsequent subsections (b) - (p) have been relabeled as subsections (c) - (q), respectively. In subsection (c), the hyphenated word "non-hazardous" is corrected to "nonhazardous."

The commission amends §331.62, Construction Standards, by adding subsection (a) to state that those construction standards for Class I nonhazardous waste wells which exceed federal standards for Class I wells do not apply to Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Adopted subsection (b) is added to stipulate construction standards substantially equivalent to federal standards for Class I nonhazardous waste wells that are authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals.

Section 331.63, Operating Requirements, is amended to add subsection (a), stating which of current subsections (a) - (l) of §331.63 apply to Class I wells in general and which apply to the special case of Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. The purpose of these changes is to specify operating requirements that are substantially equivalent to federal standards for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (a) has been relabeled as subsection (b), and subsequent subsections (b) - (l) have been relabeled as subsection (c) - (m), respectively. In subsection (j), the hyphenated word "non-hazardous" is corrected to "nonhazardous" consistent with editorial standards. Subsection (n) is added to stipulate requirements consistent with federal standards for the fluid and pressure in the annulus between the tubing and long string casing.

Section 331.64, Monitoring and Testing Requirements, is amended to add subsection (a) stating that current subsections (a) - (i) of §331.64 apply to all Class I wells except Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (k) is added to specify monitoring and testing requirements that are substantially equivalent to federal standards for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (a) has been relabeled as subsection (b), and subsequent subsections (b) - (i) have been relabeled as subsections (c) - (j), respectively.

Section 331.65, Reporting Requirements, is amended to add subsection (a), stating that current subsections (a) - (c) of §331.64 apply to all Class I wells except Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (e) is added to specify reporting requirements that are substantially equivalent to federal standards for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (a) has been relabeled as subsection (b), and subsequent subsections (b) and (c) have been relabeled as subsections (c) and (d), respectively.

Section 331.66, Additional Requirements and Conditions, is amended to state that this section applies to all Class I wells except Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. The requirements in §331.66 exceed federal requirements for Class I nonhazardous waste wells and will not apply to Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals.

Section 331.121(a)(2), Class I Wells, is amended to state that §331.121(a)(2)(A) - (R) apply to all Class I wells except Class I wells authorized to inject only nonhazardous desalination con-

centrate or nonhazardous drinking water treatment residuals. Adopted §331.121(a)(3) is added to stipulate the information, consistent with federal requirements for Class I nonhazardous waste wells, to be considered by the commission before issuing a Class I permit for a well authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (c) is amended to state that all paragraphs apply to all Class I wells except wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (c) is also amended to specify that, consistent with federal requirements for Class I nonhazardous waste wells, only §331.121(c)(1) applies to Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. This change eliminates more stringent siting criteria that are not consistent with federal requirements for nonhazardous waste wells.

Adopted §331.201 is titled, Purpose and Applicability. Subsection (a) authorizes the commission to issue a permit to dispose of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals in a Class I well if the facility meets statutory and regulatory requirements. Subsection (b) states that the commission may issue a general permit authorizing the use of a Class I well to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (c) stipulates that authorization for the use of an injection well under a general permit does not confer a vested right. Subsection (d) refers to the requirements of Chapter 336 for the use or disposal of radioactive material under new Subchapter L of Chapter 331.

Adopted §331.202 is titled, Public Notice, Public Meetings, and Public Comment. Subsection (a) states that the requirements of this section apply to processing a new general permit and amendment, renewal, revocation or cancellation of a general permit. Subsection (b) includes requirements for publishing notice of a draft general permit. Subsection (c) stipulates the contents of a public notice of a draft general permit. Subsection (d) includes requirements for public meetings for the draft general permit. Subsection (e) specifies requirements for the executive director's response to public comments on the general permit.

Adopted §331.203 is entitled, Authorizations and Notices of Intent. Subsection (a) requires submission of a Notice of Intent for a person to obtain authorization to use a Class I injection well to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Subsection (b) stipulates that the content of the Notice of Intent shall be specified in the general permit. Subsection (c) states requirements for denial of an authorization or Notice of Intent. Subsection (d) covers suspension of authorization and Notices of Intent under a general permit. The executive director is required to provide written notice to a permittee if he intends to suspend the permittee's authority to inject waste under the general permit. Subsection (e) specifies use of a permittee's compliance history in denying or suspending a permittee's authority to inject waste under the general permit.

Adopted §331.204 is entitled, Permit Duration, Amendment and Renewal. Subsection (a) stipulates a ten-year term for the general permit. Subsection (b) specifies conditions for renewal of the general permit. Subsection (c) states that, upon issuance of a renewed or amended general permit, owners or operators covered under the general permit shall submit a Notice of Intent in accordance with the requirements of the new permit. Subsection (d) requires permittees authorized under the general permit to submit an application for an individual permit before the general permit expires if the commission has not proposed to renew the general permit at least 90 days before its expiration date. Subsection (e) states that, through renewal or amendment, the commission may add or delete requirements or limitations to the general permit. Existing permittees covered by the general permit are to be provided a reasonable time to make changes necessary to comply with substantive additional requirements. Subsection (f) states that the commission must find that the general permit is consistent with the goals and policies of the Texas Coastal Management Plan.

Adopted §331.205 is titled, Fees for Notice of Intent and Notice of Change. New subsections (a) and (b) specify that a person must submit a $100 fee along with each Notice of Intent or Notice of Change, respectively, for each disposal well.

Adopted §331.206, titled Annual Fee Assessments, stipulates that annual facility and waste management fees must be paid by a person authorized by the general permit.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not intended to reduce risks to human health from environmental exposure, nor does it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The intent of the rulemaking is to implement HB 2654, passed during the 80th Legislature, 2007, and to revise technical standards for Class I nonhazardous wells injecting desalination concentrate and other water treatment residuals from public water systems so that the state's rules are no more stringent than federal Class I nonhazardous injection well regulations. The rulemaking substantially advances this purpose by: (1) amending §§331.2, 331.7, and 331.17 and adding new Subchapter L to provide for a new general permit authorizing the use of Class I injection wells to inject nonhazardous desalination concentrate or other nonhazardous drinking water treatment residuals, to implement HB 2654; (2) amending §§331.42, 331.45, 331.46, 331.62 - 331.66 and 331.121 to create a set of criteria no more stringent than the federal regulations regarding Class I nonhazardous injection wells; and (3) amending §331.7 to provide that a permit is not required from the commission for an injection well authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or drinking water treatment residuals for enhanced recovery purposes.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the rules would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the rules will be significant with

respect to the economy; therefore, the rules will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking does not exceed any standard set by federal law but rather amends the rules so that they are no more stringent or restrictive than the federal regulations. The rules do not exceed the requirements of state law under the TWC, Chapter 27. Further, the rules do not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program. Finally, the rulemaking is not adopted solely under the general powers of the agency, but rather specifically under TWC, §27.023(m), which allows the commission to adopt rules to implement the general permit authorizing use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals and TWC, §27.109, which authorizes the commission to adopt rules to implement TWC, Chapter 27, as well as the other general powers of the agency.

The commission invited public comment regarding the regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed a preliminary assessment of whether the rules would constitute a taking under Texas Government Code, Chapter 2007. The primary purposes of the adopted rules are to implement HB 2654 and to revise the technical standards for Class I wells injecting nonhazardous desalination concentrate or drinking water treatment residuals to be no more stringent than the federal regulations. The adopted rules would substantially advance these purposes by amending various sections of Chapter 331 to conform technical standards for Class I wells injecting nonhazardous desalination concentrate or drinking water treatment residuals to the federal standards and by amending various sections of Chapter 331 and adding Subchapter L to implement the general permit provided by HB 2654.

Promulgation and enforcement of the adopted rules would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rulemaking because the adopted rules neither relate to, nor have any impact on the use or enjoyment of private real property, and there would be no reduction in property value as a result of this rulemaking. Therefore, the adopted rules would not constitute a taking under Texas Government Code, Chapter 2007.

The commission has no reasonable alternative to rule adoption that could accomplish the specific purpose of implementing HB 2654 and revising technical standards to conform to federal standards.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The proposal was published in the March 14, 2008, issue of the *Texas Register* (33 *TexReg* 2236). The commission held a public hearing in Austin on April 8, 2008. The comment period closed on April 14, 2008. Written comments expressing general support for the project were received from San Antonio Water System (SAWS) and the Water Environment Association of Texas (WEAT).

RESPONSE TO COMMENTS

SAWS requested that the final rules define or reference within state or federal code, the maximum contaminant levels (MCL's) and chemical constituents that allow an entity to qualify under the general permit for the nonhazardous desalination concentrate outlined in HB 2654.

The commission did not make any changes to the rules in response to this comment. As stated in TWC, §27.023, the general permit applies to Class I injection wells injecting nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. In order for waste, including brine from a desalination operation, to be classified as nonhazardous, the brine must not meet any of the criteria for hazardous waste as specified in 40 Code of Federal Regulations (CFR) Part 261 (relating to Identification and Listing of Hazardous Waste) and 30 TAC Chapter 335 Subchapter R. If the waste is not classified as hazardous according to state and federal rules, it is considered nonhazardous. A desalination operation is defined in adopted §331.2(31) as "a process which produces water of usable quality by desalination." These are the criteria for characterization of nonhazardous desalination brine that would qualify for disposal under the general permit.

SAWS encouraged that no authorization be required for pre-injection units. However, if it is concluded that authorization under the UIC program is appropriate, SAWS asked that it be included within the general permit without additional registration and technical review. SAWS requested identification of any permitting requirements for pipelines conveying the nonhazardous desalination concentrate from the treatment plant facilities to the injection facilities.

The commission did not make any changes to the rules in response to these comments. Authorization of pre-injection units is addressed in adopted §331.7(d) which states that pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are not subject to authorization by registration but are subject to authorization by an individual permit or under the general permit issued under Subchapter L.

Pipelines that convey waste to the injection well are pre-injection units as defined in §331.2(80). Standards for pre-injection units authorized by an individual permit are covered in §331.5(c)

and §331.121(a)(2)(R). When the UIC general permit is implemented, it is anticipated that these same standards will apply to pre-injection units authorized under the general permit.

SAWS asked whether there is an anticipated date when an application can be filed under the new general permit structure. SAWS requested that the rules specify the TCEQ goals for the review period under the general permit. SAWS further commented that the information required in the Notice of Intent for the general permit should be identified.

The commission did not make any changes to the rules in response to these comments. The comments relate to implementation of the general permit, and the implementation process will be addressed after these adopted rules become effective. The issuance date of the general permit and TCEQ goals for the review period will be available after the general permit has been approved by the commission. The schedule for implementation is not known but will proceed as soon as possible. The implementation process for the general permit will include a public comment period, and SAWS may resubmit these comments for consideration as part of that process.

Regarding identification of information required in the Notice of Intent (NOI) for the general permit, adopted §331.203(b) provides that the general permit shall describe the content of the NOI. The specific content required for the NOI will be identified during the general permit implementation process, and there will be an opportunity to comment on the notice requirements.

SAWS commented that the general permit should cover a well field comprised of multiple injection wells and that, if authorization under the general permit is denied, the commission's executive director should specify the reasons for denial. SAWS also stated that criteria for approval under the general permit should be no more stringent than the requirements of federal rules.

The commission did not make any changes to the rules in response to these comments. The permitting of multiple injection wells at a facility is consistent with current permitting practice for Class I wells and will be accommodated under the general permit.

With respect to denial of authorization under the general permit, adopted §331.203(c)(1) states that the executive director shall provide written notice to a facility if the executive director denies the facility's authorization to inject waste under a general permit, including a brief statement of the basis for this decision.

Regarding the consistency of criteria for approval under the general permit with federal rules, adopted §§331.42, 331.45, 331.46, 331.62 - 331.66 and 331.121 create a set of criteria closely analogous to federal Class I nonhazardous injection well regulations for the special case of wells injecting nonhazardous desalination concentrate and other nonhazardous water treatment residuals from public water systems.

SAWS requested definition of the procedures that will allow permitting, design, and construction of Class I injection wells for nonhazardous desalination concentrate under design-build as defined under HB 1886, 80th Legislature, 2007.

The commission did not make any changes to the rules in response to this comment. This comment refers to revisions to Chapter 293, relating to Water Districts, which are currently under development in TCEQ Rule Project Number 2007-047-293-PR, Docket Number 2007-0996-RUL. If adopted, the rule package would implement HB 1886, enabling water districts to use design-build procedures, a procurement method, for certain civil works. Desalination projects are specifically listed as eligible for this procurement method.

It may become necessary for the TCEQ to ensure that requirements for obtaining and operating under the general permit do not conflict with certain portions of the design-build process related to phased project planning. These adopted rules authorize the issuance of a general permit, but do not specify requirements to obtain or operate under such a permit; therefore, SAWs' comment is outside the scope of this rulemaking. The TCEQ encourages the commenter to re-submit this concern during the development of the general permit to ensure its consideration at that time.

SAWS commented that the general permit should specify a mechanism for transitioning a pending conventional Class I permit application to processing under the new general permit.

The commission did not make any changes to the rules in response to this comment. After the general permit has been issued, we anticipate that pending Class I permit applications for disposal of only desalination concentrate or drinking water treatment residuals may be authorized under the general permit by submittal of a Notice of Intent for coverage under the general permit and withdrawal of the conventional Class I injection well application(s).

SAWS commented that the adoption of revised rules is urgent and should remain a critical focus of TCEQ.

The commission did not make any changes to the rules in response to this comment. The commission notes that this rulemaking has been processed under an expedited schedule that will result in timely implementation of HB 2654.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§331.2, 331.7, 331.17

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The amendments implement TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803200

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

SUBCHAPTER C. GENERAL STANDARDS AND METHODS

30 TAC §§331.42, 331.45, 331.46

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The amendments implement TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803201
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

SUBCHAPTER D. STANDARDS FOR CLASS I WELLS OTHER THAN SALT CAVERN SOLID WASTE DISPOSAL WELLS

30 TAC §§331.62 - 331.66

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The amendments implement TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803202
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

SUBCHAPTER G. CONSIDERATION PRIOR TO PERMIT ISSUANCE

30 TAC §331.121

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803203

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

SUBCHAPTER L. GENERAL PERMIT AUTHORIZING USE OF A CLASS I INJECTION WELL TO INJECT NONHAZARDOUS DESALINATION CONCENTRATE OR NONHAZARDOUS DRINKING WATER TREATMENT RESIDUALS

30 TAC §§331.201 - 331.206

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The adopted new sections implement TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 20, 2008.

TRD-200803204
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 10, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 239-0177

♦ ♦ ♦

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Transportation

Title 43, Part 1

In accordance with Texas Government Code, §2001.039, the Texas Department of Transportation (department) files this notice of intention to review 43 TAC Part 1, Chapter 30, Aviation, and Chapter 31, Public Transportation.

The department will accept comments regarding whether the reasons for adopting these chapters continue to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments regarding this rule review may be submitted in writing to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483.

TRD-200803277
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: June 23, 2008

♦ ♦ ♦

Texas Water Development Board

Title 31, Part 10

The Texas Water Development Board will review 31 Texas Administrative Code, Part 10, Chapter 354, Memoranda of Understanding, in accordance with Texas Government Code §2001.039.

The Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 354 continues to exist. The comment period will end at 5:00 p.m., 30 days after this notice is published in the *Texas Register*.

Comments regarding this rule review may be submitted by email to rulescomments@twdb.state.tx.us, by fax: at (512) 463-5580 or by mail: Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

TRD-200803324
Ken Petersen
General Counsel
Texas Water Development Board
Filed: June 25, 2008

♦ ♦ ♦

The Texas Water Development Board will review 31 Texas Administrative Code, Part 10, Chapter 363, Financial Assistance Programs, in accordance with Texas Government Code §2001.039.

The Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 363 continues to exist. The comment period will end at 5:00 p.m., 30 days after this notice is published in the *Texas Register*.

Comments regarding this rule review may be submitted by email to rulescomments@twdb.state.tx.us, by fax: at (512) 463-5580 or by mail: Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

TRD-200803325
Ken Petersen
General Counsel
Texas Water Development Board
Filed: June 25, 2008

♦ ♦ ♦

The Texas Water Development Board will review 31 Texas Administrative Code (TAC), Part 10, Chapter 364, Model Subdivision Rules, in accordance with Texas Government Code §2001.039.

The Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 364 continues to exist. The comment period will end at 5:00 p.m., 30 days after this notice is published in the *Texas Register*.

Comments regarding this rule review may be submitted by email to rulescomments@twdb.state.tx.us, by fax: at (512) 463-5580 or by mail: Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

TRD-200803326
Ken Petersen
General Counsel
Texas Water Development Board
Filed: June 25, 2008

♦ ♦ ♦

The Texas Water Development Board will review 31 Texas Administrative Code (TAC), Part 10, Chapter 367, Agricultural Water Conservation Program, in accordance with Texas Government Code §2001.039.

The Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 367 continues to exist. The comment period will end at 5:00 p.m., 30 days after this notice is published in the *Texas Register*.

Comments regarding this rule review may be submitted by email to rulescomments@twdb.state.tx.us, by fax: at (512) 463-5580 or by mail: Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

TRD-200803327
Ken Petersen
General Counsel
Texas Water Development Board
Filed: June 25, 2008

♦ ♦ ♦

The Texas Water Development Board will review 31 Texas Administrative Code (TAC), Part 10, Chapter 370, Colonia Plumbing Loan Program, in accordance with Texas Government Code §2001.039.

The Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 370 continues to exist. The comment period will end at 5:00 p.m., 30 days after this notice is published in the *Texas Register*.

Comments regarding this rule review may be submitted by email to rulescomments@twdb.state.tx.us, by fax: at (512) 463-5580 or by mail: Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

TRD-200803328
Ken Petersen
General Counsel
Texas Water Development Board
Filed: June 25, 2008

♦ ♦ ♦

Adopted Rule Reviews

Credit Union Department

Title 7, Part 6

The Credit Union Commission has completed the review of 7 TAC §91.7000, relating to Certificates of Indebtedness. Notice of the proposed review was published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1819).

The rule was reviewed as a result of the Department's general rule review.

The Commission received no comments with respect to this rule. The Department believes that the reasons for initially adopting this rule continue to exist. The Commission finds that the reasons for initially adopting §91.7000 continue to exist and readopts this section without changes pursuant to the requirements of Texas Government Code §2001.039.

TRD-200803245
Harold E. Feeney
Commissioner
Credit Union Department
Filed: June 23, 2008

♦ ♦ ♦

The Credit Union Commission has completed the review of 7 TAC §91.8000, relating to Discovery of Confidential Information. Notice of the proposed review was published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1819).

The rule was reviewed as a result of the Department's general rule review.

The Commission received no comments with respect to this rule. The Department believes that the reasons for initially adopting this rule continue to exist. The Commission finds that the reasons for initially adopting §91.8000 continue to exist and readopts this section without changes pursuant to the requirements of Texas Government Code, §2001.039.

TRD-200803246
Harold E. Feeney
Commissioner
Credit Union Department
Filed: June 23, 2008

♦ ♦ ♦

Joint Financial Regulatory Agencies

Title 7, Part 8

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") have completed the review of Texas Administrative Code, Title 7, Part 8, Chapter 151, relating to Home Equity Lending Procedures, comprised of §§151.1 - 151.8, and Chapter 153, relating to Home Equity Lending, comprised of §§153.1 - 153.5, 153.7 - 153.18, 153.20, 153.22, 153.24, 153.25, 153.41, 153.51, 153.82, 153.84 - 153.88, and 153.91-153.96, pursuant to Texas Government Code, §2001.039.

Notice of the review of 7 TAC Part 8, Chapters 151 and 153 was published in the *Texas Register* as required on February 1, 2008 (33 TexReg 952). The commissions believe that the reasons for initially adopting the rules contained in these chapters continue to exist. As a result of comments received on the proposed rules review notice, the commissions have determined that certain revisions are appropriate and necessary.

The commissions are proposing technical amendments to §§151.1, 151.3, 151.7, and 151.8. These amendments are being proposed in the absence of any comment. The proposed amendments to the affected sections within Chapter 151 are being concurrently published in the Proposed Rules section in this issue of the *Texas Register* and will be open for an additional 31-day public comment period prior to final adoption or repeal by the commissions.

Concerning Chapter 153, the commissions received three written comments in response to the notice from the Independent Bankers Association of Texas ("IBAT") requesting specific changes to existing interpretations. Summaries of the comments and the commissions' responses to the three comments by IBAT are contained in the following paragraphs. The proposed amendments to the affected sections within Chapter 153 are being concurrently published in the Proposed Rules section in this issue of the *Texas Register* and will be open for an additional 31-day public comment period prior to final adoption or repeal by the commissions. Please note that the full rule text of all proposed amendments referenced in the following paragraphs is provided in conjunction with the separate proposed rulemaking notice published in the Proposed Rules section in this issue of the *Texas Register*.

Regarding §153.11, the commenter states: "[I]t would be helpful if there were clarity as to how to count the two month period by which payments must begin. . . . . Bankers have asked whether they should begin counting from the date of closing or the date of funding." The commenter continues by stating: "Another issue that is relevant is whether the first payment should be on the same day as the closing or funding."

The commissions agree that clarification would be beneficial to both lenders and borrowers concerning the calculation of the constitutional period of "two months" in relation to the repayment schedule. Accord-

ingly, the commissions propose two amendments to §153.11 to address these issues. First, the commissions propose the addition of paragraph (1), which states: "The two month time period contained in Section 50(a)(6)(L)(i) begins on the date of closing." Second, the commissions also propose new paragraph (2), which provides that "a month is the period from a date in a month to the corresponding date in the succeeding month." Following this basic definition are two examples to address months with different numbers of days.

The definition of "month" and corresponding examples track those provided under Texas Finance Code, Subtitle B, §341.002. While the majority of home equity loans are subject to Subtitle A of the Texas Finance Code, there are some home equity loans that do fall under Subtitle B. Thus, in order to avoid any inconsistency for those Subtitle B home equity loans, the commissions believe that use of the same principles found in §341.002 concerning the calculation of a month as contained in proposed §153.11(2) would be most appropriate.

In reference to §153.14, the commenter states: "One issue that should be addressed is that the modification with new terms should result again in substantially equal payments." The commissions agree with the commenter and propose the addition of the following clarifying sentences to §153.14(2): "A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction." In other words, any modification of a home equity loan must still follow all constitutional home equity provisions.

Also with regard to §153.14, the commenter believes that "since the modification is simply a part of the original transaction, the 3% fee cap would apply for the original loan plus modification. In other words, there would not be a new 3% fee cap for the modification." The commissions agree with the commenter's position on this issue, as a modified home equity loan is still the same loan, same transaction. Accordingly, the commissions propose the addition of new subparagraph (D) to §153.14(2) as follows: "The 3% fee cap required by Section 50(a)(6)(E) applies to the original home equity loan and any subsequent modification as a single transaction."

And finally, the commenter also presents the following question related to §153.14: "If an applicant closes a home equity loan and then rescinds, does the applicant have to wait a year after the closing to close another home equity loan?" The commenter further states: "In the case of a rescinded loan, there is nothing to roll over. No funds were advanced. No payments were due or owed. No lien existed on the homestead. The bottom line is: A borrower should be able to rescind a loan with a lender and then immediately go to another lender to get a home equity loan."

The commissions agree with the rationale and result outlined by the commenter on this issue regarding rescinded home equity loans. The commissions, however, believe that the current language found in §153.14 results in the answer to this question being self-evident. The first sentence of existing §153.14 states (emphasis added): "An equity loan may not be closed before the first anniversary of the closing date of any other equity loan *secured* by the same homestead property." The key word in the quoted sentence is "secured." As stated by the commenter, "[n]o lien existed on the homestead." Without a lien, the rescinded loan would not be "secured by the same homestead property." Thus, the commissions decline to propose an amendment to the interpretation on this issue, as it is not necessary due to clarity of the current language.

Concerning §153.51, the commenter "recommend[s] that 7 TAC 153.51 be amended by adding a new subparagraph 4 dealing with the Spanish translation of the consumer notice." The commenter offers two possible alternatives for the new subparagraph, with one option containing the text of the notice, and the second option stating that the notice would be made available through an agency webpage or upon written request.

The commissions agree with the commenter's concept of adding a reference to permissible reliance on the Spanish translation of the consumer notice, as developed under Texas Finance Code, §341.502. The commissions prefer the commenter's second alternative but believe that availability via the internet will be sufficient. Therefore, the commissions propose the addition of §153.51(4) as follows: "A lender whose discussions with the borrower are conducted primarily in Spanish may rely on the translation of the consumer notice developed under the requirements of Texas Finance Code, §341.502. Such notice shall be made available to the public through publication on the Finance Commission's webpage."

In addition, as a result of comments received in response to previously proposed amendments to §§153.22, 153.51, and 153.84, the commissions are proposing amendments to §153.12 and §153.13 in order to further conform with the constitutional changes in Section 50, as amended effective December 4, 2007, pursuant to voter approval of Proposition 8 (House Joint Resolution Number 72), proposed in the 80th Texas Legislative Session. Therefore, the proposed amendments to §§153.11 - 153.14 and §153.51 are being concurrently published in the Proposed Rules section in this issue of the *Texas Register* as a separate action, stemming in part from rule review comments and in part from comments received on previously proposed amendments.

Any questions or written comments pertaining to the proposed amendments (published elsewhere in this issue) resulting from this rule review should be directed to Sealy Hutchings, General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or to Betsy Loar, General Counsel, Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or by email to sealy.hutchings@occc.state.tx.us or to betsy.loar@tcud.state.tx.us.

Subject to the proposed amendments to Chapters 151 and 153, the commissions find that the reasons for initially adopting these rules continue to exist, and readopts these chapters in accordance with the requirements of Texas Government Code, §2001.039.

This concludes the review of 7 TAC Part 8, Chapters 151 and 153.

TRD-200803220
Leslie L. Pettijohn
Consumer Credit Commissioner
Joint Financial Regulatory Agencies
Filed: June 20, 2008

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 1 TAC §355.8065(f)(4)(B)

$$\left((1/2 \times \text{Available Fund}) \times \frac{\text{Hospital's Medicaid Days} \times \text{Weight}}{\text{Weighted Medicaid Days}}\right) + \left((1/2 \times \text{Available Fund}) \times \frac{\text{Hospital's Low Income Days} \times \text{Weight}}{\text{Weighted Low Income Days}}\right)$$

Figure: 1 TAC §371.214(r)(2)(B)

$$Error\ Rate(ER) = \left[\frac{(Total\ Actual\ Dollars\ Overpaid - Total\ Actual\ Dollars\ Underpaid)}{Total\ Actual\ Dollars\ Sampled}\right]$$

Figure: 7 TAC §84.201(d)(1)(D)

Alternative Time Price Differential Rate Authorized by Tex. Fin. Code §348.105 Converted to an Equivalent Add-on Rate per $100 per Annum.			
Term - Number of Months	**Add-on Rate** - per $100.00 per Annum	**Term** - Number of Months	**Add-on Rate** - per $100.00 per Annum
1	18.0000	32	9.9925
2	13.5335	33	10.0061
3	12.0596	34	10.0201
4	11.3337	35	10.0346
5	10.9072	36	10.0495
6	10.6303	37	10.0648
7	10.4388	38	10.0804
8	10.3008	39	10.0963
9	10.1985	40	10.1125
10	10.1210	41	10.1290
11	10.0617	42	10.1457
12	10.0160	43	10.1626
13	9.9807	44	10.1797
14	9.9537	45	10.1970
15	9.9322	46	10.2145
16	9.9181	47	10.2322
17	9.9074	48	10.2500
18	9.9003	49	10.2697
19	9.8963	50	10.2860
20	9.8948	51	10.3042
21	9.8957	52	10.3225
22	9.8985	53	10.3409
23	9.9030	54	10.3594
24	9.9089	55	10.3780
25	9.9161	56	10.3967
26	9.9245	57	10.4155
27	9.9339	58	10.4343
28	9.9441	59	10.4532
29	9.9552	60	10.4721
30	9.9670	61	10.4911
31	9.9795		

Figure: 7 TAC §84.201(d)(2)(B)(iii)

TERM - # OF MONTHS	ADD-ON RATES PER $100.00 PER ANNUM			
	$7.50	$10.00	$12.50	$15.00
1	18.0000%	18.0000%	18.0000%	18.0000%
2	18.0000%	18.0000%	18.0000%	19.9452%
3	18.0000%	18.0000%	18.6541%	22.3624%
4	18.0000%	18.0000%	19.8374%	23.7670%
5	18.0000%	18.0000%	20.5996%	24.6655%
6	18.0000%	18.0000%	21.1215%	25.2754%
7	18.0000%	18.0000%	21.4935%	25.7054%
8	18.0000%	18.0000%	21.7659%	26.0160%
9	18.0000%	18.0000%	21.9688%	26.2435%
10	18.0000%	18.0000%	22.1215%	26.4109%
11	18.0000%	18.0000%	22.2367%	26.5338%
12	18.0000%	18.0000%	22.3232%	26.6226%
13	18.0000%	18.0338%	22.3875%	26.6849%
14	18.0000%	18.0812%	22.4340%	26.7265%
15	18.0000%	18.1171%	22.4664%	26.7513%
16	18.0000%	18.1435%	22.4872%	26.7626%
17	18.0000%	18.1621%	22.4985%	26.7628%
18	18.0000%	18.1743%	22.5020%	26.7540%
19	18.0000%	18.1809%	22.4988%	26.7375%
20	18.0000%	18.1830%	22.4901%	26.7148%
21	18.0000%	18.1811%	22.4768%	26.6867%
22	18.0000%	18.1758%	22.4594%	26.6542%
23	18.0000%	18.1677%	22.4387%	26.6178%
24	18.0000%	18.1570%	22.4150%	26.5783%
25	18.0000%	18.1442%	22.3889%	26.5360%
26	18.0000%	18.1294%	22.3605%	26.4915%
27	18.0000%	18.1130%	22.3304%	26.4449%
28	18.0000%	18.0952%	22.2986%	26.3968%
29	18.0000%	18.0761%	22.2654%	26.3472%
30	18.0000%	18.0559%	22.2311%	26.2964%
31	18.0000%	18.0347%	22.1957%	26.2446%
32	18.0000%	18.0126%	22.1594%	26.1920%
33	18.0000%	18.0000%	22.1224%	26.1387%
34	18.0000%	18.0000%	22.0847%	26.0848%
35	18.0000%	18.0000%	22.0464%	26.0305%
36	18.0000%	18.0000%	22.0077%	25.9759%
37	18.0000%	18.0000%	21.9686%	25.9210%
38	18.0000%	18.0000%	21.9292%	25.8659%
39	18.0000%	18.0000%	21.8895%	25.8106%
40	18.0000%	18.0000%	21.8496%	25.7553%
41	18.0000%	18.0000%	21.8095%	25.7000%
42	18.0000%	18.0000%	21.7693%	25.6447%
43	18.0000%	18.0000%	21.7290%	25.5894%
44	18.0000%	18.0000%	21.6886%	25.5343%
45	18.0000%	18.0000%	21.6483%	25.4793%
46	18.0000%	18.0000%	21.6079%	25.4245%
47	18.0000%	18.0000%	21.5679%	25.3699%
48	18.0000%	18.0000%	21.5273%	25.3155%
49	18.0000%	18.0000%	21.4871%	25.2613%
50	18.0000%	18.0000%	21.4469%	25.2074%

TERM - # OF MONTHS	ADD-ON RATES PER $100.00 PER ANNUM			
	$7.50	$10.00	$12.50	$15.00
51	18.0000%	18.0000%	21.4069%	25.1537%
52	18.0000%	18.0000%	21.3670%	25.1003%
53	18.0000%	18.0000%	21.3272%	25.0473%
54	18.0000%	18.0000%	21.2876%	24.9945%
55	18.0000%	18.0000%	21.2481%	24.9420%
56	18.0000%	18.0000%	21.2088%	24.8898%
57	18.0000%	18.0000%	21.1696%	24.8380%
58	18.0000%	18.0000%	21.1307%	24.7865%
59	18.0000%	18.0000%	21.0919%	24.7354%
60	18.0000%	18.0000%	21.0533%	24.6845%
61	18.0000%	18.0000%	21.0149%	26.6341%
62	18.0000%	18.0000%	20.9767%	24.5839%
63	18.0000%	18.0000%	20.9387%	24.5342%
64	18.0000%	18.0000%	20.9009%	24.4847%
65	18.0000%	18.0000%	20.8633%	24.4357%
66	18.0000%	18.0000%	20.8259%	24.3870%
67	18.0000%	18.0000%	20.7888%	24.3386%
68	18.0000%	18.0000%	20.7518%	24.2906%
69	18.0000%	18.0000%	20.7151%	24.2430%
70	18.0000%	18.0000%	20.6786%	24.1957%
71	18.0000%	18.0000%	20.6423%	24.1488%
72	18.0000%	18.0000%	20.6063%	24.1022%
73	18.0000%	18.0000%	20.5705%	24.0559%
74	18.0000%	18.0000%	20.5349%	24.0101%
75	18.0000%	18.0000%	20.4995%	23.9645%
76	18.0000%	18.0000%	20.4643%	23.9194%
77	18.0000%	18.0000%	20.4294%	23.8745%
78	18.0000%	18.0000%	20.3947%	23.8300%
79	18.0000%	18.0000%	20.3602%	23.7859%
80	18.0000%	18.0000%	20.3259%	23.7421%
81	18.0000%	18.0000%	20.2919%	23.6986%
82	18.0000%	18.0000%	20.2581%	23.6555%
83	18.0000%	18.0000%	20.2245%	23.6127%
84	18.0000%	18.0000%	20.1911%	23.5702%

Figure: 7 TAC §84.808(1)(A)

"(Optional:)DATE _____)
BUYER _____
ADDRESS _____
CITY _____STATE_____ ZIP _____
PHONE _____

SELLER/CREDITOR_____
ADDRESS _____
CITY _____ TX__ ZIP _____
PHONE _____

(Optional Co-Buyer Identification)
CO-BUYER _____
ADDRESS _____
CITY _____ STATE_____ZIP____
PHONE _____"

Figure: 7 TAC §84.808(5)

MOTOR VEHICLE IDENTIFICATION

Stock No.	Year	Make	Model	Vehicle Identification Number	License Number (if applicable)	☐ New ☐ Demonstrator ☐ Factory Official/Executive ☐ Used	USE FOR WHICH PURCHASED ☐ PERSONAL, FAMILY OR HOUSEHOLD ☐ BUSINESS OR COMMERCIAL ☐ AGRICULTURAL

Figure: 7 TAC §84.808(6)

"Trade-in: Year_____ Make_____ Model_____ VIN_____ License No._____"

Figure: 7 TAC §84.808(7)

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	**Amount Financed** The amount of credit provided to me or on my behalf.	**Total of Payments** The amount I will have paid after I have made all payments as scheduled.	**Total Sale Price** The total cost of my purchase on credit, including down payment of $_____
%	$	$	$	$

My Payment Schedule will be:

Number of Payments	**Amount of Payments**	**When Payments Are Due**

Security: You will have a security interest in the motor vehicle being purchased.
Late Charge: **[True daily earnings:]** (Option A:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the past due amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment. **[Scheduled Installment Earnings Method or sum of the periodic balances:]** (Option A:) If I do not pay my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge on the past due amount at the contract rate. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the late amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option C:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment.
Prepayment: **[True daily earnings method:]** If I pay all that I owe early, I will not have to pay a penalty. **[Sum of the periodic balances method:]** I can pay all that I owe early. If I do so, I can get a refund of part of the Finance Charge.
Additional Information: I will refer to this document for information about nonpayment, default, security interests, any required repayment in full before the scheduled date, and prepayment refunds.

Figure: 7 TAC §84.808(8)(A)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Downpayment =
[*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
Gross trade-in $_____
- payoff by seller $_____
= net trade-in $_____
[*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
+ cash $_____
+ Mfrs. Rebate $_____
+ other (describe) _____ $_____
Total downpayment $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on my behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Other insurance paid to the insurance company $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Sales tax [*Optional addition*: (if not included in cash price)] $_____
   I. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   J. Government license and/or registration fees $_____
   K. Government certificate of title fee $_____
   L. Government vehicle inspection fees $_____
   M. Deputy service fee paid to dealer $_____
   N. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law. [*Option to insert Spanish translation of disclosure here.*]** $_____
   O. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
   Total other charges and amounts paid to others on my behalf $_____(4)

5. **Amount Financed** (3 + 4) $_____(5)

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $7.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller and the seller may also retain parts of the insurance, service contracts, and other charges.]

[*Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.*]

Figure: 7 TAC §84.808(8)(B)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Downpayment (A + B) =
   A. [*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
   Gross trade-in $_____
   - payoff by seller $_____
   = net trade-in $_____
   B. [*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
   + cash $_____
   + Mfrs. Rebate $_____
   + other (describe) _____ $_____
   Total downpayment $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on my behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Other insurance paid to the insurance company $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   I. Government license and/or registration fees $_____
   J. Government certificate of title fee $_____
   K. Government vehicle inspection fees $_____
   L. Deputy service fee paid to dealer $_____
   M. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law.** [***Option to insert Spanish translation of disclosure here.***] $_____
   N. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
   Total Itemized Charges upon which the Finance Charge is assessed $_____(4)

5. Total Unpaid Balance Plus Itemized Charges Upon which the Finance Charge is assessed. (3+4) $_____(5)

6. Total Sales Tax (Upon Which No Finance Charge is Assessed) $_____(6)

7. **Amount Financed** (5+6) $_____(7)

   Finance Charge (Not Assessed Upon Sales Tax) $_____

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $7.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller.]

[***Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.***]

Figure: 7 TAC §84.808(10)

DEFERRED DOWNPAYMENT(S)	
AMOUNT	DATE DUE

Figure: 7 TAC §84.808(11)

MODEL CLAUSE FOR PHYSICAL DAMAGE INSURANCE

PROPERTY INSURANCE: I must keep the collateral insured against damage or loss in the amount I owe. I must keep this insurance until I have paid all that I owe under this contract. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas. I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss.

[Note: The following optional provisions are included for Creditors who finance physical damage insurance. Creditors who do not routinely finance Physical Damage coverage, or who are not financing it in a particular transaction, may delete the remaining disclosures in this Figure. A creditor may also delete those portions below that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

If any insurance is included below, policies or certificates from the insurance company will describe the terms, conditions and deductibles.

A. Physical damage insurance. If you obtain physical damage insurance, the coverages, terms and premiums for these terms are set forth below.

Coverage	Term in Months	Premium
Collision	___	☐$_____
Comprehensive	___	☐$_____
Fire, Theft, and Combined Additional Coverage	___	☐$_____
Other	___	☐$_____

B. Optional coverages with physical damage insurance. If I have chosen this insurance, the premiums for the initial _____ month term are itemized below. ***[Note: alternatively, these optional coverages may be disclosed as part of Figure: 7 TAC §84.209(12).]***

☐$_____ Towing and Labor Costs Reimbursement ☐$_____ Rental Reimbursement

☐$_____ Other:_____

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner. If the premium is for a required coverage, I have the option, for a period of 10 days from the date I receive a copy of this contract, of furnishing that coverage through existing policies of insurance or by obtaining like coverage from any insurance company authorized to do business in Texas.

I agree to purchase the above checked coverages.

Buyer's Signature: _____ Date: _____

Figure: 7 TAC §84.808(12)

MODEL CLAUSE FOR OPTIONAL INSURANCE COVERAGES

Optional insurance coverages. The insurance described below is not required to obtain credit. It will not be provided unless I sign and agree to pay the extra cost. [*At Creditor's Option, the following may be added:*] My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

Coverage	Term in Months	Premium
GAP*	_____	☐ $_____
Involl. Unemployment	_____	☐ $_____
_____	_____	☐ $_____
Liability Insurance	_____	☐ $_____

$_____ per person $_____ property damage
$_____ per accident

*If the motor vehicle is determined to be a total loss, GAP Insurance will pay you the difference between the proceeds of my basic collision policy and the amount I owe on the motor vehicle, minus my deductible. I can cancel that insurance without charge for 10 days from the date of this contract.

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner.

I want the optional coverages for which premiums are included above.

Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance optional coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the Figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

Figure: 7 TAC §84.808(13)

MODEL CLAUSE FOR OPTIONAL CREDIT LIFE AND ACCIDENT AND HEALTH (DISABILITY) INSURANCE

Optional credit life and credit disability insurance. Credit life insurance and credit disability insurance are not required to obtain credit. They will not be provided unless I sign and agree to pay the extra cost. [***At Creditor's Option, the following may be added:***] My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

☐Credit Life, one buyer	$_____	☐Credit Life, both buyers	$_____	Term _____
☐Credit Disability, one buyer	$_____	☐Credit Disability, both buyers	$_____	Term _____

[***Optional additional sentence for balloon payment contracts:***] Credit Life Insurance is for the scheduled term of this contract. Credit Disability Insurance covers the first ____ payments and does not cover the last scheduled payment. [***Optional additional language for true daily earnings method contracts:***] Credit life insurance pays only the amount I would owe if I paid all my payments on time. Credit disability insurance does not cover any increase in my payment or in the number of payments.

If the term of the insurance is 121 months or longer, the premium is not fixed or approved by the Texas Insurance Commissioner.

I want the insurance indicated above.
Buyer's Signature: _____ Date: _____
Co-Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance these coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the Figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

Figure: 7 TAC §84.808(15)

"Any change to this contract must be in writing. Both you and I must sign it. No oral changes to this contract are enforceable.

_____Buyer _____Co-Buyer"

Figure: 7 TAC §84.808(18)(B)

"

_____ _____

Buyer Date Seller Date

_____

Co-Buyer Date

THIS CONTRACT IS NOT VALID UNTIL YOU AND I SIGN IT."

Figure: 7 TAC §84.808(21)

"You will apply my payments in the following order:

1. earned but unpaid finance charge; and
2. anything else I owe under this agreement."

Figure: 7 TAC §84.808(31)

"To secure all I owe on this contract and all my promises in it, I give you a security interest in:

- the motor vehicle including all accessories and parts now or later attached (Optional: and any other goods financed in this contract);
- all insurance proceeds and other proceeds received for the motor vehicle;
- any insurance policy, service contract or other contract financed by you and any proceeds of those contracts; and
- any refunds of charges included in this contract for insurance, or service contracts.

This security interest also secures any extension or modification of this contract. The certificate of title must show your security interest in the motor vehicle."

Figure: 7 TAC §84.808(34)(A)

"I will be in default if:

- I do not pay any amount when it is due;
- I break any of my promises in this agreement;
- I allow a judgment to be entered against me or the collateral; or
- I file bankruptcy, bankruptcy is filed against me, or the motor vehicle becomes involved in a bankruptcy.

If I default, you can exercise your rights under this contract and your other rights under the law."

Figure: 10 TAC §80.100(b)(1)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR MANUFACTURER'S LICENSE

(Please type or print clearly.)

Check one:	**[ ] Corporation**	**[ ] Partnership**	**[ ] Sole Proprietorship**	**[ ] Other**

1. Legal Business Name:	
2. Have you ever been licensed by TDHCA?	**[ ]YES [ ] NO If yes, provide license number:**
3. Physical Location Address:	**City, State, ZIP and County**
4. Phone:	**Fax:**
5. Mailing Address:	**City, State, ZIP and County**
6. Date applicant became owner, operator (or date incorporated):	

7. Provide list of all trade names and the names of all other business organizations subject to this chapter and the name and address of any such business organization registered with the secretary of state (additional may be listed on a separate sheet).

Trade Name	Physical Address, City, State, and ZIP

8. Provide complete information on ALL owners, principals, partners and/or corporate officers (additional may be listed on a separate sheet).

NOTE: Providing your social security number is optional, HOWEVER, the processing of your application may be delayed without it.

Legal Name and Title	Mailing Address, City, State & ZIP	Phone	Date of Birth	SSN

9. Provide complete list of all persons (other than the principals listed above), who directly or indirectly participate in management or policy decisions for this applicant.

Legal Name and Title	Mailing Address, City, State and ZIP	Phone

10. Have you, or a corporate officer or partner, been convicted of any felony or misdemeanor offense, OTHER than a Class C misdemeanor for traffic violations, within the five years PRECEDING this application?	**[ ]YES [ ] NO** If YES, complete the required Criminal Conviction Questionnaire ensuring that you provide accurate and thorough details sufficient to persuade the Department that you conviction does not pose a threat to the consumer or the industry. **A DPS criminal check will be performed.**

11. Plant Certification Date:	
12. Production Inspection Primary Inspection Agency Label Prefix:	
13. Design Approval Primary Inspection Agency:	
14. Provide physical address, city, state and ZIP, where records will be kept (this can be the principal location or an alternate in-state location):	

15. Will you have a manufacturing plant or service facility in Texas? [ ] YES [ ] NO

If NO, to assure the availability of prompt and satisfactory warranty service, a manufacturer which does not have a licensed manufacturing plant or other facility in Texas from which warranty service and repairs can be provided and made, shall be bonded or post other security in an additional amount of $100,000.

Or, to be exempt from the additional security, you must have a bona fide service facility in Texas, pursuant to Section 80.40(d) of the Administrative Rules.

Name of Facility:
Address:
City/State/ZIP:
Phone:

Certification

License is subject to revocation, if the Department is **NOT** notified in writing of any changes in the information given on this application or if there is a violation of the law.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

(Signature of Applicant or President, if incorporated) *(Date)*

(Signature of Secretary, if incorporated) *(Date)*

Department Use Only

Education:	***Fees:***	***Additional Requirements:***
[ ] 20 hours of Department Education in Austin, Texas	[ ] $250.00 Education Fee [ ] $550.00 Retailer Licensing Fee [ ] $900.00 Retailer/Broker Licensing Fee [ ] $900.00 Ret./Installer Licensing Fee [ ] $1250.00 Ret./Brok./Inst. Licensing Fee	[ ] $50,000 BOND/CD [ ] Public Liability Insurance [ ] *Motor Vehicle Liability Insurance [ ] *Cargo Insurance (*if transporting homes) [ ] Retailer's Physical Damage

Figure: 10 TAC §80.100(b)(2)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR LICENSE
(FOR A RETAILER, BROKER, INSTALLER AND/OR REBUILDER)

(Please type or print clearly.)

Check one: [ ] Corporation [ ] Partnership [ ] Sole Proprietorship [ ] Other

1. Legal Business Name:			
2. Have you ever been licensed by TDHCA?	[ ]YES [ ] NO	**If yes, provide license number:**	
3. Physical Location Address:	**City, State, ZIP and County**		
4. Phone:		**Fax:**	
5. Mailing Address:	**City, State, ZIP and County**		
6. Date applicant became owner, operator (or date incorporated):			

7. Provide list of all trade names and the names of all other business organizations subject to this chapter and the name and address of any such business organization registered with the secretary of state (additional may be listed on a separate sheet).

Trade Name	Physical Address, City, State, and ZIP

8. Provide complete information on ALL owners, principals, partners and/or corporate officers (additional may be listed on a separate sheet).

NOTE: Providing your social security number is optional, HOWEVER, the processing of your application may be delayed without it.

Legal Name and Title	Mailing Address, City, State & ZIP	Phone	Date of Birth	SSN

9. Provide complete list of all persons (other than the principals listed above), who directly or indirectly participate in management or policy decisions for this applicant.

Legal Name and Title	Mailing Address, City, State and ZIP	Phone

10. Have you, or a corporate officer or partner, been convicted of any felony or misdemeanor offense, OTHER than a Class C misdemeanor for traffic violations, within the five years PRECEDING this application?	[ ]YES [ ] NO If YES, complete the required Criminal Conviction Questionnaire ensuring that you provide accurate and thorough details sufficient to persuade the Department that you conviction does not pose a threat to the consumer or the industry. **A DPS criminal check will be performed.**

11. Indicate which type of license you are applying for:

[ ] **R**= Retailer [ ] **RB**= Retailer/Broker [ ] **RI**=Retailer/Installer [ ] **RBI**=Retailer/Broker/Installer
[ ] **B**= Broker [ ] **I**= Installer [ ] **RB=Rebuilder**

12. As applicable, indicate what function(s) you will be performing:	**[ ] Transporting [ ] Installation**
13. Are you in arrears on any taxes owed to the State of Texas? **Are you in arrears on a guaranteed student loan?**	**[ ] YES [ ] NO** **[ ] YES [ ] NO** If you answered YES to either question, provide proof that you are in good standing with them or that you have made payment arrangements.
Provide physical address, city, state and ZIP, where records will be kept (this can be the principal location or an alternate in-state location):	

Certification

License is subject to revocation, if the Department is NOT notified in writing of any changes in the information given on this application or if there is a violation of the law.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

(Signature of Applicant or President, if incorporated) *(Date)* *(Signature of Secretary, if incorporated)* *(Date)*

Department Use Only

Education:	***Fees:***	***Additional Requirements:***
[ ] 20 hours of Department Education in Austin, Texas	[ ] $250.00 Education Fee [ ] $550.00 Retailer Licensing Fee [ ] $350.00 Broker Licensing Fee [ ] $350.00 Installer Licensing Fee [ ] $900.00 Retailer/Broker Licensing Fee [ ] $900.00 Ret./Installer Licensing Fee [ ] $1250.00 Ret./Brok./Inst. Licensing Fee	[ ] $50,000 BOND/CD [ ] Public Liability Insurance [ ] *Motor Vehicle Liability Insurance [ ] *Cargo Insurance (*if transporting homes) [ ] Retailer's Physical Damage

Figure: 10 TAC §80.100(b)(4)

Texas Department of Housing and Community Affairs

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-3506

Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR SALESPERSON'S LICENSE

(Please type or print clearly.)

1. Name of Salesperson:	**2. Date of Birth:**	/ /
3. Home Address:	**4. Social Security #:**	- -
City: **State:** **Zip:**		
5. Telephone: Home ( )	**Telephone: Work ( )**	**Fax: ( )**
6. Sponsoring Retailer:	**Sponsoring Retailer's Lic. #:**	
7. Business Address:		
City: **State:** **Zip:**		

8. List dates, employer and address for each job or position at which you have worked for the past three years. All gaps in employment must be explained.

(Dates) *(Employer)* *(Address)*

(Dates) *(Employer)* *(Address)*

(Dates) *(Employer)* *(Address)*

9. Have you ever been licensed by TDHCA? YES / NO If so, please provide license number:

10. Have you been convicted of any felony or misdemeanor offense, other than a Class C misdemeanor for a traffic violation, within the five years PRECEDING this application?

[ ]YES [ ] NO *If YES, complete the enclosed Criminal Conviction Questionnaire.*

Are you in arrears on any taxes owed to the State of Texas? **[ ] YES [ ] NO**

Are you in arrears on a guaranteed student loan? **[ ] YES [ ] NO**

Certification

License is subject to revocation, if the Department is **NOT** notified in writing of any changes in the information given on this application or if there is a violation of the law. License will be suspended if the education requirements of §1201.104(c) are not successfully completed by the next scheduled course offered after the date the license is issued.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

(Signature of Applicant) *(Date)* *(Signature of Sponsoring Retailer)* *(Date)*

Payment

Attach the required license fee of $200.00 (two hundred dollars) to this application. Payment may be made by company or business firm check, money order or cashier's check. Please make payable to: ***Texas Department of Housing and Community Affairs***. Mail to the address listed at the top of this form.

Department Use Only

Fees	[ ] $200.00 License Fee	Date Received:	/ /

Application for Salesperson's License *Page 1 of 1*

Figure: 10 TAC §80.100(b)(16)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTICE OF INSTALLATION (FORM T)

HUD Label or Texas Seal # (s): _____ ***Serial # (s):*** _____

Manufacturer Name: _____ ***License No.*** _____

Home Size - Width / Length: _____ X _____ *Weight* _____ *Date of Manufacture:* ____/____/____ *Model / Name:* _____

Draw A Map To Provide Directions To Home On Page 2

Consumer: _____ Phone Numbers: Home: (___) _____ Work: (___) _____

Mailing Address: _____ City _____ ZIP: _____

Site Address: _____ City _____ ZIP: _____

County Where Home is Installed: _____

Actual Installation Date: ____/____/____ Wind Zone on Data Plate: I (___) II (___) III (___)

Is the home installed in a Humid & Fringe Climate Yes (___) No (___) Was the home labeled for alternate construction. Yes (___) No (___)

	Name	Address	License #	Expiration Date	Phone #
Retailer					
Installer					

(___) **New** (___) **Used** **Does retailer or installer provide skirting? Yes (___) No (___)**

Is installation part of sales contract of used home? Yes (___) No (___) Not Applicable (___)

The home has been installed in accordance with:

(___) **1. Manufacturer's Home Installation Instructions (provide page number or option _____).**

(___) **2. State Generic Standards - Title 10 Texas Administrative Code (10 TAC) §§80.22, 80.23, 80.24, and 80.25.**

(___) **3. A stabilization system registered with the Department in accordance with 10 TAC §80.26 - *provide name of system or reference to MHD Approval Letter or registration*_____.**

(___) **4. A Special Foundation System *(attach a copy of the drawing for this system and provide a reference, if applicable, to any drawing previously submitted).***

IF NO METHOD IS CHECKED, IT WILL BE PRESUMED THAT OPTION 2 (STATE GENERIC STANDARDS) WAS USED.

To be submitted to the Department along with the required fee no later than the 7th day after which the installation is completed. The Installation Report (Form T) should no longer be submitted with the title documents.

Per §1201.206(i): **On secondary moves the notice must be accompanied by either the original notice of installation or a certification that a true and correct copy of the notice of installation has been provided to the chief appraiser of the county where the home is installed. The delivery of the copy of the notice to the chief appraiser may be accomplished by either certified mail or by electronic mailing of the electronically reproduced document in a commonly readable format.**

I verify that I am a licensed installer, that I am responsible for the installation described, and that the information supplied is true and correct. Executed this_____ day of _____,_____.

_____ _____

Signature (Retailer/Installer) **Name (print or type)**

Department Use Only	
☐ Inspected Without Violations	☐ Not Inspected, Unable to Locate
☐ Inspected With Violations	☐ Not Inspected, No Unit At Location
☐ Not Inspected, Unit Skirted	☐ Not Inspected, Unit Not Accessible

Inspection Date: _____ HUD/Seal #: _____

I hereby certify on this _____ day of _____, 20_____ that the above inspection results are true and correct to the best of my knowledge and belief.

Inspector Signature: _____ Printed Name: _____

DRAW MAP BELOW

Figure: 10 TAC §80.100(b)(19)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR STATEMENT OF OWNERSHIP AND LOCATION

The filing of an application for the issuance of a Statement of Ownership and Location, later than sixty (60) days after the date of a sale to a consumer for residential use, may result in a fee of up to one hundred dollars ($100). Any such application that is submitted late may be delayed until the fee is paid in full.

BLOCK 1: Transaction Identification

This application is for:
- ☐ New home application
- ☐ Used home application
- ☐ Other

_____

(For Department Use Only) Coding:

Lien on file: Y / N Lienholder Code

County Code: Right of Surv.: Y / N

Retailer #: Manufacturer #:

BLOCK 2(a): Home Information (required)

Manufacturer Name:		Model:	
Address:		Date of Manufacture:	
City, State, Zip:		Total Square Feet:	
License Number:		Wind Zone:	

	Label/Seal Number	*Complete Serial Number*	*Weight*	*Size**
Section 1:				X
Section 2:				X
Section 3:				X
Section 4:				X

** NOTE: Size must be reported as the outside dimensions (length and width) of the home as measured to the nearest ½ foot at the base of the home, exclusive of the tongue or other towing device.*

2(b) ☐ Is home being sold? ☐ No ☐ Yes
If yes, and **if there is/are no HUD Label(s) or Texas Seal**(s) on your home, a Texas Seal will be need to be purchased and will be issued to each section of your home at an **additional cost** of $35.00 per section.
Single - $35 Double - $70 Triple - $105

BLOCK 3: Home Location (required)

Physical Location of Home: *(or 911 address)*

Physical Address (cannot be a Rt. or P. O. Box) *City* *State* *ZIP* *County*

Was home moved for this sale? ☐ No ☐ Yes
Was Home Installed for this sale? ☐ No ☐ Yes If yes, provide installer information below, if known

Installer Name, address and phone:

BLOCK 4: Ownership Information (required)

4(a) Seller(s) or Transferor(s)		4(b) Purchaser(s), Transferee(s), or Owner(s)	
Name	License # if Retailer:	Name	License # if Retailer:
Name		Name	
Mailing Address		Mailing Address	
City/State/Zip		City/State/Zip	
Daytime Phone Number ( ) -		Daytime Phone Number ( ) -	

4(c) Date of sale, transfer or ownership change:

4(d) Did the buyer trade-in a home to purchase this home? ☐ No ☐ Yes If yes, provide the following:

HUD Label _____, Serial No. _____

HUD Label #:	Serial #:	GF# (for title co.):

BLOCK 5: Right of Survivorship (if no box is checked, joint owners will NOT have right of survivorship)

If joint owners desire right of survivorship, check the applicable box below:

☐ Husband and wife will be the only owners and agree that the ownership of the above described manufactured home shall, from this day forward, be held jointly and in the event of death, shall pass to the surviving owner.

☐ Joint owners are other than husband and wife, desire right of survivorship, **and** have attached a completed Affidavit of Fact for Right of Survivorship or other affidavits as necessary to meet the requirements of §1201.213 of the Standards Act.

BLOCK 6: Personal/Real Property Election - Purchaser(s)/Transferee(s)/Owner(s) check one election type:

☐ Personal Property – Applicant elects to treat this home as personal property. All documents affecting title to the home will be filed in the records of the Department.

☐ Real Property – I (we) elect to treat this home as real property and certify that I am (we are) entitled to make this election in accordance with Section 1201.2055 of the Occupations Code because (**one** box **must** be checked):

☐ I (we) own the real property that the home is attached to. ☐ I (we) have a qualifying long-term lease for the land that the home is attached to.

I (We) understand that the home will not be considered to be real property until a certified copy of the SOL has been filed in the real property records of the county in which the home is located AND a copy stamped "Filed" has been submitted to the Department.

Legal description must be provided for real property: _____

_____

If a title company, list your file or GF #: _____

☐ **Inventory** – ***(FOR RETAILER USE ONLY)*** Retailer number must be provided in Block 4b if this election is checked.

BLOCK 7: Designated Use - to be designated by purchaser(s), transferee(s), or owner(s)

☐ Residential Use (as a dwelling) OR

☐ Non-Residential - Check **one** of the following: ☐ *Business Use* ☐ *Salvage*

BLOCK 8: Liens – To specify any liens on the SOL the NOTICE OF LIEN FORM must be completed and submitted with the application. To prevent an SOL from being issued without a lien, in the event the Notice of Lien is detached, indicate name and phone number of lienholder's contact person and phone number.

Lienholder's Representative: _____ **Phone:** _____

BLOCK 9: Special Mailing Instructions.

IF a copy of an SOL is to be mailed to anyone other than the owner or lienholder of record (such as a closing agent), please provide that mailing address here and enclose the additional fee.

Name:	
Company:	
Street Address:	
City, State, Zip:	
Area Code/Phone	

BLOCK 10: Certification and Notarization - The statements set forth herein are made under oath and are true and correct.

☐ *Seller* certifies that any required habitability warranty has been delivered (consumer to consumer sales are exempt).

☐ *Seller* certifies that the purchaser has been given a written disclosure on a form prescribed by the Department describing the condition of the home and of any appliances that are included in the home.

10(a) Notarized signature of each seller/transferor	10(b) Notarized signature of each purchaser/transferee or owner
_____ *Signature of owner or authorized seller*	_____ *Signature of purchaser/transferee or owner*
Sworn and subscribed before me this ____ day of _____, 20___	*Sworn and subscribed before me this ____ day of _____, 20___*
_____ *Signature of Notary*	_____ *Signature of Notary*
SEAL	*SEAL*
_____ *Signature of owner or authorized seller*	_____ *Signature of purchaser/transferee or owner*
Sworn and subscribed before me this ____ day of _____, 20___	*Sworn and subscribed before me this ____ day of _____, 20___*
_____ *Signature of Notary*	_____ *Signature of Notary*
SEAL	*SEAL*

Figure: 10 TAC §80.100(b)(20)

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-1109

Internet Address: www.tdhca.state.tx.us/mh/index.htm

AFFIDAVIT OF FACT FOR REAL PROPERTY

(Sworn Statement)

BLOCK 1: Home Information

Manufacturer:_____ Model:_____

Serial Number:_____ Label # and/or Seal #:_____

Square Footage:_____ Size:_____

BLOCK 2: Statement of Facts

The undersigned hereby certifies that the closing of a mortgage loan to be secured by real property including the manufactured home identified herein was held, the loan was funded, and a deed of trust covering the real property and all improvements on the property was recorded (copy attached) and the licensed title company or attorney who closed the loan failed to complete the conversion to real property in accordance with Chapter 1201 of the Occupations Code. In connection with an Application for a Statement of Ownership and Location electing real property status for the purpose of obtaining a certified copy of the Statement of Ownership and Location and making the necessary filings and notifications to complete such conversion, I hereby certify the following:

(1) the record owner of the home, as reflected on the department's records, has been given at least 60 days' prior written notice by certified mail at:

(A) the location of the home and, if it is different, the mailing address of the owner as specified in the department records; and

(B) any other location the holder or servicer knows or believes, after a reasonable inquiry, to be an address where the owner may have been or is receiving mail or is an address of record.

BLOCK 3: Signature *(Notarization is REQUIRED)*

_____

(Signature of holder's or servicer's authorized representative)

_____

(Printed name and title of authorized representative)

Before me personally appeared the person (s) whose signature (s) appear above, who by being sworn, upon oath, say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this _____ day of _____ 20 ____.

_____

(Name of Notary)

_____ *SEAL*

(Notary Public)

_____

(Commission Expires) *Notary Public State of Texas*

Figure: 10 TAC §80.100(b)(24)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

Addendum to Application for Statement of Ownership and Location

BLOCK 1: Home Information

HUD Label:_____ Serial Number:_____

BLOCK 2: Statement of Facts

(Provide the information checked below.)

1. _____**Physical address is:** _____
(cannot be a Rt. or P.O. Box) Address City State ZIP County

2. _____**Purchaser's mailing address is:** _____
Address City State ZIP County

3. _____**Seller's mailing address is:** _____
Address City State ZIP County

4. _____**Date of Sale:** _____

5. _____**Designated Use is:** [ ] Residential Use (as a dwelling) OR
[ ] Non-Residential If non-residential, specify: [ ] *Business Use* **or** [ ] *Salvage*

6. _____**HUD Label number(s):** Section 1 _____

Section 2_____

Section 3_____

_____ Home has no label number(s). I have enclosed $35 per seal , per section (Singlewide $35 Double $70, Triple $105)

_____ Home has no label OR serial number anywhere on the home. I have stated so under oath, in a sworn statement, on the back of this form.

7. _____**Legal Description:**

_____
_____
_____

Block 3: Signature(s)

I hereby state to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs as follows:

In connection with my application for a Statement of Ownership and Location for the above-described manufactured home, I hereby provide the following information as an addendum to my application:

_____ _____
(Seller's Signature) *(Purchaser's Signature)*

_____ _____
(Seller's Signature) *(Purchaser's Signature)*

Figure: 10 TAC §80.100(b)(31)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTICE OF LIEN TO PERFECT A LIEN (OTHER THAN TAX LIEN)

BLOCK 1: Home Information (required)		
	Label/Seal Number	*Complete Serial Number*
Section 1:		
Section 2:		
Section 3:		
Section 4:		

BLOCK 2: Liens - Specify any liens (other than tax liens), charges, or other encumbrances to be recorded on the SOL			
Effective Date of Lien:		Effective Date of Lien:	
Name of First Lienholder:		Name of Second Lienholder:	
Mailing Address:		Mailing Address:	
City/State/ZIP:		City/State/ZIP:	
Daytime Phone Number:	( )	Daytime Phone Number:	( )
Dollar amount of Lien:	$	Dollar Amount of Lien:	$

BLOCK 3: Signature of owner/borrower

_____ *Signature of purchaser/transferee or owner*	_____ *Signature of purchaser/transferee or owner*

BLOCK 4: For Lien Assignments

_____ Name of Former Lienholder	_____ Name of New Lienholder
_____ Signature of Authorized Representative	_____ Signature of Authorized Representative
Sworn and subscribed before me this ____ day of _____, 20___	Sworn and subscribed before me this ____ day of _____, 20___
_____ Signature of Notary	_____ Signature of Notary
SEAL	SEAL

Figure: 10 TAC §80.100(b)(32)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTIFICATION OF FILING STATUS AS A CENTRAL TAX COLLECTOR

Please type or print clearly.

BLOCK 1: Central Tax Collector Information

Central Collector Name: _____

Central Collector's Address: _____
(Address) *(City)* *(State) (Zip Code)*

Phone #: ( ) **FAX #: ( )** **Email:**

BLOCK 2: Assignment of Central Tax Collector Number

(Department Use Only. The Department will notify taxing entity of the assigned number.)

Central Tax Collector Number: CTC-_____

BLOCK 3: Taxing Jurisdiction Information

County Name: _____ **County Code (3 digits):** _____

Complete 8-Digit Taxing Entity ID #	Name of Taxing Entity

Additional taxing entities may be listed on the reverse side of this form.

BLOCK 4: Notarized Signature Required

Until revoked by written notice to the Department, the undersigned will be the sole agent of each taxing entity listed herein for the recordation and release of tax liens on manufactured homes within the county specified herein. The undersigned represents and warrants that it is acting as a centralized collector and that it has legal authority to record and release such liens under the Central Tax Collector number designated herein. A lien filed for a particular year under the designated Central Tax Collector number may be for taxes due to one or more of the entities for which the Central Collection Agent collects, whereas a lien release filed for that year under that same number indicates that ALL taxes due to each entity for which the Agent collects have been discharged. In the event that any of the information provided herein changes, the undersigned agrees and undertakes to provide the Department with written notice of such change at least ten (10) days prior to its taking effect, and until and unless such written notice has been actually received by the Department at least ten (10) days prior to its taking effect, the Department will not be bound by it.

_____ _____
(Central Collector's Signature) *(Date)*

Before me personally appeared the person(s) whose signature(s) appear above, who by being sworn, upon oath, say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this _____ day of 20____.

_____
(Name of Notary)

_____ *SEAL*
(Notary Public)

_____
(Commission Expires) *Notary Public State of Texas*

BLOCK 3: Taxing Jurisdiction Information (Continued From Front)	
Complete 8-Digit Taxing Entity ID #	**Name of Taxing Entity**

Figure: 10 TAC §80.100(b)(35)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR LICENSE RENEWAL (OTHER THAN SALESPERSONS)

Renew your license in one of 3 ways:

- **NEW! Renew online using a credit card or electronic check.** For eligibility requirements and other information, visit us on the web at www.tdhca.state.tx.us/mh/industry-info.htm. Please help us improve by completing the survey afterward.
- Complete this application and mail it with the renewal fee and proof that you completed the continuing education to: TDHCA, P.O. Box 12489, Austin, Texas 78711-2489
- Deliver in person this completed application with the fee to MHD on the 1st floor at: 221 East 11th Street, Austin, Texas

BLOCK 1: Applicant Information *(Please type or print clearly.)*

License Number: _____ Current Business Name: _____

Expiration Date: ___/___/___ Current Mailing Address: _____

City/State/ZIP: _____

Has there been a business name change that you have not yet reported to TDHCA? [ ] Yes [ ] No
If yes, you must submit acceptable evidence that your bond covers the changes.

Has there been any change in location that you have not yet reported to TDHCA? [ ] Yes [ ] No
If yes, you must submit acceptable evidence that your bond covers the changes.

Has there been any change in corporate officers that you have not yet reported to TDHCA? [ ] Yes [ ] No
If yes, please list name(s) and date(s) of birth on the back of this page.

Have you, or a corporate officer or partner, been convicted in Texas or any other state of any felony or misdemeanor offense, other than a class c misdemeanor for a traffic violation, in the last 12 months? [ ] Yes [ ] No
If yes, please visit our website or contact our office to obtain a *Criminal Conviction Affidavit*, which you must complete and submit with this application.

Are you in arrears on any taxes owed the State of Texas? [ ] Yes [ ] No
If yes, please call Tax Assistance at (512) 463-4600 or 1-800-252-5555.

Are you in arrears on a guaranteed student loan? [ ] Yes [ ] No
If yes, please call the Guaranteed Student Loan Corporation at (512) 835-1900.

Attach a list of all related persons to this application as required by §1201.103 of the Standards Act.

BLOCK 2: License Type and Fees

Please check one:	[ ] Retailer (R)	$550	[ ] Retailer/Installer (RI)*	$900
	[ ] Broker (B)	$350	[ ] Retailer/Broker/Installer (RBI)*	$1250
	[ ] Installer (I)*	$350	[ ] Salvage Rebuilder (S)	$550
	[ ] Retailer/Broker (RB)	$900	[ ] Manufacturer (M)	$850

* Installers must have a current certificate of insurance on file or submit it with this notice.

BLOCK 3: Certification

With knowledge of the penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

_____	(___)___-____	_____	_____
Printed Name and Title	Phone Number	Signature of Owner or Corporate Officer	Date

Department Use Only: [ ] License Renewal Fee Received Date Received: ___/___/___

Figure: 10 TAC §80.100(b)(38)

PROBATIONARY INSTALLATION

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

Fax this report within 3 working days from the date of installation to your assigned field office. Mail the original and fee by regular mail to the address on the letterhead.

NOTICE OF INSTALLATION (FORM T)

HUD Label or Texas Seal # (s): _____ ***Serial # (s):*** _____

Manufacturer Name: _____ ***License No.*** _____

Home Size - Width / Length: _____ X _____ *Weight* _____ *Date of Manufacture:* ____/____/_____ *Model / Name:* _____

Draw A Map To Provide Directions To Home On Page 2

Consumer: _____ Phone Numbers: Home: (___) _____ Work: (___) _____

Mailing Address: _____ City _____ ZIP: _____

Site Address: _____ City _____ ZIP: _____

County Where Home is Installed: _____

Actual Installation Date: ____/____/_____ Wind Zone on Data Plate: I (___) II (___) III (___)

Is the home installed in a Humid & Fringe Climate Yes (___) No (___) Was the home labeled for alternate construction. Yes (___) No (___)

	Name	Address	License #	Expiration Date	Phone #
Retailer					
Installer					

(___) New (___) Used **Does retailer or installer provide skirting? Yes (___) No (___)**

Is installation part of sales contract of used home? Yes (___) No (___) Not Applicable (___)

The home has been installed in accordance with:

(___) 1. Manufacturer's Home Installation Instructions (provide page number or option _____).

(___) 2. State Generic Standards - Title 10 Texas Administrative Code (10 TAC) §§80.22, 80.23, 80.24, and 80.25.

(___) 3. A stabilization system registered with the Department in accordance with 10 TAC §80.26 - *provide name of system or reference to MHD Approval Letter or registration*_____.

(___) 4. A Special Foundation System *(attach a copy of the drawing for this system and provide a reference, if applicable, to any drawing previously submitted).*

IF NO METHOD IS CHECKED, IT WILL BE PRESUMED THAT OPTION 2 (STATE GENERIC STANDARDS) WAS USED.

To be submitted to the Department along with the required fee no later than the 7th day after which the installation is completed. The Installation Report (Form T) should no longer be submitted with the title documents.

Per §1201.206(i): **On secondary moves the notice must be accompanied by either the original notice of installation or a certification that a true and correct copy of the notice of installation has been provided to the chief appraiser of the county where the home is installed. The delivery of the copy of the notice to the chief appraiser may be accomplished by either certified mail or by electronic mailing of the electronically reproduced document in a commonly readable format.**

I verify that I am a licensed installer, that I am responsible for the installation described, and that the information supplied is true and correct. Executed this_____ day of _____,_____.

_____ Signature (Retailer/Installer)

_____ Name (print or type)

NOTE: A minimum of five (5) probationary installations must be inspected without violations for a probationary installer's license to become a full installer's license.

Department Use Only	
☐ Inspected Without Violations	☐ Not Inspected, Unable to Locate
☐ Inspected With Violations	☐ Not Inspected, No Unit At Location
☐ Not Inspected, Unit Skirted	☐ Not Inspected, Unit Not Accessible

Inspection Date: _____ HUD/Seal #: _____

I hereby certify on this _____ day of _____, 20_____ that the above inspection results are true and correct to the best of my knowledge and belief.

Inspector Signature: _____ Printed Name: _____

DRAW MAP BELOW

Figure: 10 TAC §80.100(b)(39)

This notice must be sent by certified mail, return receipt requested, to the owner of record of the manufactured home described below and each lien holder, including any holder of a tax lien, reflected in the official records of the Texas Department of Housing and Community Affairs, Manufactured Housing Division, as of the date that this notice is sent.

IMPORTANT NOTICE OF INTENT TO ACQUIRE OWNERSHIP OF AN ABANDONED MANUFACTURED HOME

RE: Manufactured Home with HUD label, Texas Seal and/or Serial Number(s) _____ _____ (the "Home")

Name and address of owner(s) of record:

_____
_____
_____
_____

Name and address of 1st lienholder of record:

_____
_____
_____

Name and address of 2nd lienholder of record:

_____
_____
_____

Name and address of Tax Assessor-Collector where home is located:

_____
_____
_____

Dear _____:

The above-referenced Home is on my real property located at _____ _____ and appears to have been abandoned. It has been continuously unoccupied for at least four months, and the following indebtedness, secured by the Home, is delinquent (insert description of indebtedness including holder/payee):

_____

_____

It is my INTENT TO DECLARE THE HOME ABDANDONED. It is my intent forty-five (45) days from the date of this letter, to declare the Home to be abandoned and to apply to the Texas Department of Housing and Community Affairs, Manufactured Housing Division, for a Statement of Ownership and Location with respect to the Home, reflecting me to be the owner of the Home, free and clear of any liens, all in accordance with Tex. Occ. Code, §1201.217.

_____ _____

(Printed Name of Real Property Owner) *(Signature of Real Property Owner)*

Figure: 10 TAC §80.100(b)(40)

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-1109

Internet Address: www.tdhca.state.tx.us/mh/index.htm

AFFIDAVIT OF FACT FOR ABANDONMENT

(Sworn Statement)

BLOCK 1: Home Information

Manufacturer:_____ Model:_____

Serial Number:_____ Label # and/or Seal #:_____

BLOCK 2: Statement of Facts

I own the real property on which the manufactured home identified above is located. Such manufactured home has been continuously unoccupied for at least four (4) months. Any indebtedness secured by the manufactured home is delinquent. I have made reasonable efforts to locate and give notice to all owners and lienholders of record with the Department that I am seeking to acquire ownership of this manufactured home pursuant to Tex. Occ. Code, Section 1201.217, Manufactured Home Abandoned. The manufactured home has remained on the real property for at least forty-five (45) days after the date that each such notice was postmarked. As evidence that all notice requirements have been fulfilled and that I am entitled to a statement of ownership and location reflecting me as the owner of the manufactured home, I have attached a true and correct copy of each of the following documents:

- Each notice and the return receipt for certified mail that was sent to the following:
  - Each owner of the home at the address(es) on the statement of ownership and location records of the Department.
  - Each lienholder, including the county in which the home is located, and each holder of a recorded tax lien, on the statement of ownership and location records of the Department.
- Evidence that any indebtedness secured by the manufactured home is delinquent.

For any certified mail for which the return receipt indicated that such mail was unclaimed or undeliverable, I have made a reasonable effort to determine the location of the party to whom such mail was addressed and, if I could locate an alternative address, I sent them the same notice at the alternative address by certified mail, and copies of the return receipts for such certified mail are attached.

I certify that my ownership of the above-described real property is duly recorded in the deed or real property records for the county where such property is located.

BLOCK 3: Signatures *(Notarization is REQUIRED)*

_____ _____

(Signature) *(Signature)*

Before me personally appeared the person(s) whose signature(s) appear above, who by being sworn, upon oath, say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this _____ day of _____ 20 ____.

_____

(Name of Notary)

_____ *SEAL*

(Notary Public)

_____

(Commission Expires) *Notary Public State of Texas*

Figure: 10 TAC §80.100(b)(41)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

Disclosure to Consumer
(Possible Need to Vacate Home if Financing does not Close)

BLOCK 1: Home Information

Manufacturer:_____ Model:_____

Serial Number:_____ Label No. and/or Seal No:_____

Square Footage:_____ Size:_____

BLOCK 2: Occupancy of a Manufactured Home Before Closing

A retailer must provide this disclosure prior to allowing a consumer to occupy a manufactured home before financing is complete, pursuant to Tex. Occ. Code, Section 1201.513(b).

(b) A retailer may not knowingly permit a consumer to occupy a manufactured home that is the subject of a sale, exchange, or lease-purchase to that consumer before the closing of any required financing unless the consumer is first given a form adopted by the board disclosing that if for any reason the financing does not close, the consumer may be required to vacate the home.

BLOCK 3: Signatures

_____ _____
(Signature) *(Printed Name)*

_____ _____
(Signature) *(Printed Name)*

Figure: 10 TAC §80.100(b)(42)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

SALESPERSON'S APPLICATION FOR LICENSE RENEWAL

Renew your license in one of 3 ways:

- Renew online using a credit card or electronic check. For eligibility requirements and other information, visit us on the web at www.tdhca.state.tx.us/mh/industry-info.htm. Please help us improve by completing the survey afterward.
- Complete this application and mail it with the renewal fee to: TDHCA, P.O. Box 12489, Austin, Texas 78711-2489
- Deliver in person this completed application with the fee to MHD on the 1st floor at: 221 East 11th Street, Austin, Texas

Type	Renewal Fee	1 to 90 days late (1 ½ times the renewal)	90 to 364 days late (2 times the renewal fee)
Salesperson	$200	$300	$400

BLOCK 1: Salesperson Information ***(Please type or print clearly.)***

License Number: _____ Expiration Date: / /

Name: _____

Current Mailing Address: _____

City/State/ZIP: _____

Home Phone: _____

Work Phone: _____

Have you been convicted in Texas or any other state of a felony or misdemeanor offense, other than a Class C misdemeanor for a traffic violation, in the last 24 months? [ ] Yes [ ] No

If yes, please visit our website or contact our office to obtain a *Criminal Conviction Affidavit.*

BLOCK 2: Employer Information

Name of Sponsoring Retailer: _____

Sponsoring Retailer's Address: _____

City/State/ZIP: _____

Sponsoring Retailer's License#: _____

BLOCK 3: Certification

License is subject to revocation, if the Department is **NOT** notified in writing of any changes in the information given on this application or if there is a violation of the law. Evidence that the continuing education requirements of §1201.113 have been completed must be received by the Department before the license can be renewed.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

_____ _____ _____ _____

(Signature of Applicant) *(Date)* *(Signature of Sponsoring Retailer)* *(Date)*

Department Use Only: [ ] License Renewal Fee Received Date Received: / /

Figure: 10 TAC §80.100(b)(43)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR LICENSE INSTRUCTION PROVIDER

(Please type or print clearly.)

Check one: [ ] 20 Hour Initial Licensing Class [ ] 8 Hour Continuing Education Class

1. Legal Business Name:	
2. Have you ever been an approved License Instruction Provider by TDHCA?	[ ]YES [ ] NO If yes, provide dates:

3. Physical Location Address:	**City, State, ZIP and County**

4. Phone:		**Fax:**	

5. Mailing Address:	**City, State, ZIP and County**

6. Email Address:	

7. Provide complete list of all instructors (additional instructors may be listed on a separate sheet). Attach biographies and credentials for each instructor.

Legal Name and Title	Mailing Address, City, State and ZIP	Phone

Certification

License Instruction Provider is subject to revocation, if the Department is **NOT** notified in writing of any changes in the information given on this application or if there is a violation of the law.

Included with this application is a true and correct copy of the course material to be used for said course.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents are true and correct.

(Signature of Applicant or President, if incorporated) *(Date)* *(Signature of Secretary, if incorporated)* *(Date)*

Department Use Only

Education:	*Fees:*	*Additional Requirements:*
[ ] Copy of Course Material	[ ] $300.00 Fee	[ ] Biography for each instructor [ ] Credentials for each instructor [ ] Schedule of fees to be charged for the course

Figure: 22 TAC §7.10(b)

Fee Description	Architects Interior	Landscape Architects	Interior Designers
Exam Application	$100	$100	$100
Examination	1071****	***	**
Registration by Examination - Resident	155	*355	*355
Registration by Examination - Nonresident	180	*380	*380
Reciprocal Application	150	150	150
Reciprocal Registration	*400	*400	*400
Active Renewal - Resident	*305	*305	*305
Active Renewal - Nonresident	*400	*400	*400
Active Renewal 1-90 days late - Resident	*457.50	*457.50	*457.50
Active Renewal greater than 90 [~~91-365~~] days late - Resident	*610	*610	*610
Active Renewal 1-90 days late - Nonresident	*600	*600	*600
Active Renewal greater than 90 [~~91-365~~] days late - Nonresident	*800	*800	*800
Emeritus Renewal - Resident	10 [~~25~~]	10 [~~25~~]	10 [~~25~~]
Emeritus Renewal - Nonresident	10 [~~183~~]	10 [~~183~~]	10 [~~183~~]
Emeritus Renewal 1-90 days late - Resident	15 [~~37.50~~]	15 [~~37.50~~]	15 [~~37.50~~]
Emeritus Renewal greater than 90 [~~91-365~~] days late - Resident	20 [~~50~~]	20 [~~50~~]	20 [~~50~~]
Emeritus Renewal 1-90 days late - Nonresident	15 [~~274.50~~]	15 [~~274.50~~]	15 [~~274.50~~]
Emeritus Renewal greater than 90 [~~91-365~~] days late - Nonresident	20 [~~366~~]	20 [~~366~~]	20 [~~366~~]
Inactive Renewal - Resident	25	25	25
Inactive Renewal - Nonresident	125	125	125
Inactive Renewal 1-90 days late - Resident	37.50	37.50	37.50
Inactive Renewal greater than 90 [~~91-365~~] days late - Resident	50	50	50
Inactive Renewal 1-90 days late - Nonresident	187.50	187.50	187.50
Inactive Renewal greater than 90 [~~91-365~~] days late - Nonresident	250	250	250
Reciprocal Reinstatement	610 [~~620~~]	610 [~~620~~]	610 [~~620~~]
Change in Status - Resident	65	65	65
Change in Status - Nonresident	95	95	95
Reinstatement - Resident	685	685	685
Reinstatement - Nonresident	775	775	775
Certificate of Standing - Resident	30	30	30
Certificate of Standing - Nonresident	40	40	40
Replacement or Duplicate Wall Certificate - Resident	40	40	40
Replacement of Duplicate Wall Certificate - Nonresident	90	90	90
Duplicate Pocket Card	0	0	0
Reopen Fee for closed candidate files	25	25	25
Examination - Administrative Fee	-	40	-
Examination - Record Maintenance	25	25	25
Returned Check Fee	25	25	25
Application by Prior Examination	-	-	100
Administrative Fee for 1.5 Hour LARE Review	-	22	-
Administrative Fee for 1 Hour LARE Review	-	17	-

*These fees include a $200 professional fee required by the State of Texas and deposited with the State Comptroller of Public Accounts into the General Revenue Fund. The fee for initial architectural registration by examination does not include the $200 professional fee. Under the statute, the professional fee is imposed only upon each renewal of architectural registration.

**NCIDQ fee: [~~2007--$720,~~] 2008--$720, 2009--$730. Specified amounts are maximum estimates made by NCIDQ, the examination provider for the entire examination. Contact the Board or the examination provider for the fee for each section of the examination.

***LARE fee: [~~Fiscal Year 2007--$885,~~] Fiscal Year 2008--$935, Fiscal Year 2009--$950. Specified amounts are estimates made by CLARB, the examination provider for the entire examination. Contact the Board or the examination provider for the fee for each section of the examination.

****Fee for ARE Version 3.1. The fee for ARE 4.0 which is available July 2008 is $1190.

Figure: 28 TAC §5.4001(c)(2)(B)(i)

TEXAS WINDSTORM [~~CATASTROPHE PROPERTY~~] INSURANCE ASSOCIATION
[~~1.~~] PROCEDURE FOR CALCULATING MEMBER ASSESSMENT PERCENTAGES [~~POOL PARTICIPATION~~] INCLUDING CREDIT FOR VOLUNTARY WRITINGS

[1]	[2]	[3]	[4]
STATEWIDE DIRECT WRITTEN PREMIUMS [~~PREMIUM~~]	NET DIRECT WRITTEN PREMIUMS [~~PREMIUM~~]	COMPANY PERCENT OF STATEWIDE PREMIUMS WRITTEN	TOTAL PREMIUMS [~~PREMIUMS~~] IN CATASTROPHE AREAS [~~AREA~~]
(a)(b)(c) E.C. CMP HO	Total of Col. [1](a) & (b) x 90% Col. [1](c) x 50% [~~Col. [1](c) x 40% (50%)*~~]	[2] ÷ Total of [2]	(ASSOCIATION [~~TCPIA~~] + VOLUNTARY)
[5]	[6]	[7]	[8]
NORMAL REQUIRED QUOTA IN DESIGNATED AREAS [~~AREA~~]	CREDIT FOR COMPANY'S VOLUNTARY PREMIUMS	DIFFERENCE BETWEEN NORMAL REQUIRED PARTICIPATION AND VOLUNTARY CREDIT PREMIUMS	ASSOCIATION ASSESSMENT PERCENTAGE [~~ASSIGNMENT IN ASSOCIATION~~] PRIOR TO OFFSET
([3] x [4])	(not to exceed column [5])	([5] - [6])	[7] ÷ Total of [7]
[9]	[[~~10~~]]	[[~~11~~]]	
NET ASSOCIATION ASSESSMENT PERCENTAGE [~~ASSIGNMENT AFTER OFFSET FACTOR~~]	[~~ASSIGNMENT AFTER APPLICATION OF~~]	[~~NET ASSIGNMENT IN ASSOCIATION~~]	
(After application of offset)	[~~20% minimum or 190% maximum of Column [3] (170% maximum)**~~]	[~~After application of offset following minimum-maximum limitations~~]	

[~~* For association policies effective on and after January 1, 1983.~~]

[~~** For association policies effective on and after January 1, 1984.~~]

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Notice of Intent to Amend and Extend Consultant Services Contract

The Child Support Division (CSD) of the Office of the Attorney General (OAG) currently has a consulting services contract with Deloitte Consulting, LLP of 400 West 15th Street, Suite 1700, Austin, Texas 78701. Deloitte Consulting is providing consulting services related to:

Determining implementation readiness for projects identified in initial contract;

Performing Business Process Redesign (BPR) initiative activities and providing BPR initiative deliverables;

Deploying IT architecture framework;

Performing feasibility studies;

Performing security assessment;

Development and implementation continuity assurance.

The original contract was executed on January 22, 2007, and expired on August 31, 2007, with five options to extend. The first optional renewal concludes on August 31, 2008.

Deloitte Consulting was selected as the consultant for this project after a competitive process whereby the OAG evaluated four proposals that were submitted as a result of the invitation to submit proposals that was published in the September 15, 2006, issue of the *Texas Register* (31 TexReg 8019).

The OAG intends to extend this consulting services contract and amend it to describe Deloitte Consulting's role after submitting BPR recommendations. Pursuant to Texas Government Code, Chapter 2254, Subchapter B, before extending and amending the contract with Deloitte Consulting, the OAG publishes this notice and invitation to qualified and experienced consultants interested in providing the consulting services described in this notice.

SCOPE OF SERVICES:

The scope of work focuses on creating detailed project plans, requirements, and design for the OAG approved projects, as well as the continuity necessary from the previous contract terms to enable the OAG to achieve its vision. The contractor will also establish the technical and procedural infrastructure necessary to implement the approved recommendations.

FINDING OF FACT:

The OAG has submitted a request to the Budget, Planning and Policy Division of the Governor's Office for a Finding of Fact that the requested consulting services are necessary. Extension of the contract or execution of a new contract is contingent upon receipt of this Finding of Fact.

CRITERIA FOR SELECTION:

The OAG intends to negotiate with Deloitte Consulting the extension and amendment to its consulting services contract to include this scope of work, unless the OAG receives a better offer for the desired consulting services. The OAG will make its selection based on demonstrated competence, knowledge, and qualifications, considering the reasonableness of the proposed fees for consulting services.

SUBMITTING OFFERS:

Any consultant submitting an offer in response to this notice must provide the following with the offer:

(1) The consultant's legal name and address;

(2) A description of the consultant's experience in the business process redesign field;

(3) Information regarding the qualifications, education, and experience of the team(s) proposed to provide these consulting services;

(4) The price to perform the entire scope of services;

(5) The earliest date on which the consultant could begin to provide services;

(6) A list of three references, including any Child Support customers for which the consultant has performed services;

(7) A previous or sample BPR implementation plan that represents the consultant's work;

(8) A completed Historically Underutilized Businesses subcontracting plan (the forms can be found at *http://www.window.state.tx.us/procurement/prog/hub/hub-subcontracting-plan/*);

(9) The following completed forms (available from the OAG Contact identified below): Certification Regarding Lobbying, Consultant Assurances with Certification, and Consultant Release of Liability (to References).

In order to be considered for this Consulting Services contract, a Response should be submitted, in accordance with the instructions in this notice to the OAG by 2:00 p.m. (CST) on August 4, 2008.

Telephone and facsimile responses will not be accepted. Responses may be submitted by mail to the mailing address listed below; or may be hand delivered to the physical address listed below.

Mailing Address:

Office of the Attorney General

Child Support Division

Attention: David Cousins, Assistant Attorney General

P.O. Box 12017

Austin, Texas 78711-2017

E-mail: David.Cousins@oag.state.tx.us

Physical Address:

Office of the Attorney General

Child Support Division

Attention: David Cousins, Assistant Attorney General

5500 E. Oltorf Street, Room 375

Austin, Texas 78741-7400

E-mail: David.Cousins@oag.state.tx.us

QUESTIONS:

Questions concerning this notice and invitation should be submitted in writing or by e-mail to the point of contact listed above.

OAG RIGHTS:

The OAG reserves the right to accept or reject any or all offers submitted. The OAG is under no obligation to execute any contract on the basis of this notice. The OAG will not pay for any costs incurred by any entity in responding to this notice.

For more information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

TRD-200803335
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: June 25, 2008

♦ ♦ ♦

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of June 13, 2008, through June 19, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on June 25, 2008. The public comment period for this project will close at 5:00 p.m. on July 25, 2008.

FEDERAL AGENCY ACTIONS:

Applicant: Port of Corpus Christi; Location: The project is located at numerous locations throughout the Inner Harbor of the Corpus Christi Ship Channel from its entrance to the Viola Turning Basin, and also the Rincon Canals, in Corpus Christi, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Corpus Christi, Texas and Annaville, Texas. Approximate UTM Coordinates for the project area in NAD 27 (meters): Zone 14; POB Easting: 657243; Northing: 3077230/POE Easting: 645271; Northing: 3080510. Rincon Canal central coordinates are: Easting: 658186; Northing: 3079710. Project Description: The applicant proposes to maintenance dredge approximately 25 cargo and oil dock areas, and also Rincon Canals A and B, over a 10-year period. Hydraulically dredged material will be placed in various confined placement areas. Mechanical dredging methods include mechanical excavator, clamshell, dragline, water injection, water lift, underwater grading and/or blade and drag beam leveling. A 10-year maintenance dredging period has been requested. CCC Project No.: 08-0163-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-01897 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Port Isabel San Benito Navigation District; Location: The project is located on the west side of the Port Isabel Turning Basin, south of the most southerly existing dock, in Port Isabel, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Isabel, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 678885; Northing: 2882772. Project Description: The applicant proposes to construct a 600-foot by 40-foot concrete and steel sheet pile wharf and backfill to the high bank of the existing shoreline for the purpose of providing a dock facility for the fabrication of offshore pipelines. The wharf and backfill will result in the loss of approximately 1.3 acres of open water area which includes most of a 25,055-square-foot submerged seagrass area. The proposed dredging will impact 6.23 acres of open water, including the remainder of the 25,055-square-foot seagrass area. A total of 91,213 cubic yards of bank and channel bottom are to be excavated by clamshell bucket and the berth area is to be dredged to a depth of minus 37 feet mean low tide, out to the centerline of the federal channel. Dredged material is to be placed in the existing placement area adjacent to the proposed wharf. A 1.73-acre constructed mitigation area is proposed on the outside toe of the U.S. Army Corps of Engineers (Corps) Dredged Material Placement Area No. 3 levee, which is located next to the Port Isabel Channel that is across from Long Island. Mitigation consists of lowering existing elevations to render the area conducive to the growth of seagrass. The mitigation also requires the placement of concrete mats for side slope stabilization. CCC Project No.: 08-0172-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00408 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: EOG Resources, Inc.; Location: The project is located in Nueces Bay, in State Tracts (ST's) 708, 710, 723, 748, and 788. The proposed access channel will begin at the north side of Rincon Channel and would extend approximately 2,160 feet to the north to the proposed work basin in ST 788. The proposed pipeline would extend south and then west from the basin to a proposed termination point on land in Corpus Christi, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Corpus Christi, Texas. Approximate UTM Coordinates in NAD 27 (meters) for the proposed well location is: Zone 14; Easting: 659415; Northing: 3081341. Project Description: This is a modification to the location of four oil/gas wells in ST 788 which were originally proposed under Permit Application 24075. The applicant proposes to hydraulically dredge an access channel and work basin in Nueces Bay. Approximately 19,500 cubic yards of material would be dredged to form the channel and basin area, and the material would be pumped to one of the Port of Corpus Christi Authority Dredged Material Placement Areas. CCC Project No.: 08-0173-F1. Type of Application: U.S.A.C.E. permit application #SWG-2006-00087 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: R. E. Odom; Location: The project is in a boat slip to Cow Bayou, at a site located on the right descending side of the bayou, approximately 800 feet downstream from Round Bunch Road and 6 miles southeast of Orange, Texas in Orange County. The project can be located on the U.S.G.S. quadrangle map entitled: Orangefield, Texas.

Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 423489; Northing: 3322787. Project Description: The applicant proposes to place fill material into 0.25 acres of open water to fill an existing boat slip. The applicant wishes to restore the boat slip to uplands. This will provide erosion protection to the existing house. The existing boat slip was authorized under Corps Permit No. 5321. CCC Project No.: 08-0174-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-00933 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200803241
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: June 23, 2008

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 06/30/08 - 07/06/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 06/30/08 - 07/06/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200803284
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: June 23, 2008

♦ ♦ ♦

Court of Criminal Appeals

Miscellaneous Rule 08-101

Procedures in Death Penalty Cases Involving Requests for Stay of Execution and Related Filings in Texas State Trial Courts and the Court of Criminal Appeals

To ensure that all appropriate state and federal courts, officials, and parties shall have an adequate opportunity to review and resolve legal and factual issues concerning an impending execution, the Court of Criminal Appeals has adopted Miscellaneous Rule 08-101, effective Monday, June 23, 2008. This rule is modeled upon an analogous rule adopted by the Fifth Circuit Court of Appeals.

SIGNED AND ENTERED this 23rd day of June, 2008.

_____

Sharon Keller, Presiding Judge

_____

Lawrence E. Meyers, Judge

_____

Tom Price, Judge

_____

Paul Womack, Judge

_____

Cheryl Johnson, Judge

_____

Michael Keasler, Judge

_____

Barbara Hervey, Judge

_____

Charles Holcomb, Judge

_____

Cathy Cochran, Judge

MISCELLANEOUS RULE 08-101

Procedures in Death Penalty Cases Involving Requests for Stay of Execution and Related Filings in Texas State Trial Courts and the Court of Criminal Appeals.

1. *Time Requirements for Habeas Petitions or Other Motions.* Inmates sentenced to death who seek a stay of execution or who wish to file a subsequent writ application or other motion seeking any affirmative relief from, or relating to, a death sentence must exercise reasonable diligence in timely filing such requests. A motion for stay of execution, or any other motion relating to a death sentence, shall be deemed untimely if it is filed less than forty-eight hours before 6:00 p.m. on the scheduled execution date. Thus, a request for a stay of execution filed at 7:00 p.m. on a Monday evening when an execution is scheduled on Wednesday at 6:00 p.m. is untimely.

2. *Special Requirements for Untimely Petitions or Other Motions.* Counsel who seek to file an untimely motion for a stay of execution or who wish to file any other untimely motion requesting affirmative relief in an impending execution case, must attach to the proposed filing a detailed explanation stating under oath, subject to the penalties of perjury, the reason for the delay and why counsel found it physically, legally, or factually impossible to file a timely request or motion. Counsel is required to show good cause for the untimely filing.

3. *Sanctions.* Counsel who fails to attach a sworn detailed explanation to an untimely filing or who fails to adequately justify the necessity for an untimely filing shall be sanctioned. Such sanctions include, but are not limited to, (1) referral to the Chief Disciplinary Counsel of the State Bar of Texas; (2) contempt of court; (3) removal from the list of Tex. Code Crim. Proc. Art. 11.071 list of attorneys; (4) restitution of costs incurred by the opposing party; (5) any other sanction allowable under Tex. R. Civ. P. 215.2.

TRD-200803285

Louise Pearson
Clerk of the Court
Court of Criminal Appeals
Filed: June 23, 2008

♦ ♦ ♦

Texas Education Agency

Request for Applications Concerning the Rural Technology Grant Pilot Program, Cycle 2

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-08-118 from school districts that (a) have an enrollment of fewer than 5,000 students; (b) are not located in an area defined by the U.S. Office of Management and Budget as a standard metropolitan statistical area as of January 1, 2007; and (c) respond to the electronic Mandatory Notice of Intent to Apply by 5:00 p.m. (Central Time), Friday, August 8, 2008.

A list of all Texas school districts that meet the first two eligibility requirements for the Rural Technology Grant Pilot Program, Cycle 2 (that is, all districts with enrollment of less than 5,000 that are located outside a standard metropolitan area), can be found on the TEA website at http://www.tea.state.tx.us/technology/rtech/eligibilitylist.pdf. The Mandatory Notice of Intent to Apply can be downloaded from the TEA website at http://www.tea.state.tx.us/technology/rtech/index.html. Applicants who fail to submit the Mandatory Notice of Intent to Apply by the deadline will not be considered for funding.

Applicants that applied for and received funding in the 2007-2010 Rural Technology Grant Pilot Program may apply again but must use Cycle 2 funds to serve a different grade and/or different subject.

Description. The purpose of this grant program is to establish pilot programs to provide technology-based supplemental instruction, including online courses, to students in rural school districts to improve the overall success of the students and address their individual academic needs. The Rural Technology Grant Pilot Program, Cycle 2, is designed to improve student performance for students not currently meeting standards in English language arts, social studies, mathematics, science, or languages other than English and to supplement the education of students needing more opportunities than currently provided by the district.

Districts selected for the pilot program are entitled to receive state grant funds in an amount not to exceed $200 per school year for each student in Grades 6-12 participating in the program. As a condition of receiving a state grant, the district must contribute additional funding of at least $100 per school year for each student in Grades 6-12 participating in the program for activities provided at the campus through the program. A campus participating in the program must provide students with individual access to technology-based supplemental instruction for at least 10 hours each week.

Dates of Project. The Rural Technology Grant Pilot Program, Cycle 2, will be implemented during the 2009-2010 school year. Applicants should plan for a starting date of no earlier than January 1, 2009, and an ending date of no later than May 31, 2010.

Project Amount. Approximately $1.5 million is available for this grant program. Project funding in the subsequent grant period will be based on satisfactory progress of the first-year objectives and activities and on budget approval by the commissioner of education and the state legislature.

Selection Criteria. Applications will be selected based on the following priorities: (1) diverse geographical representation across the state; (2) greatest need overall as indicated by a district's rating under the 2007 state accountability rating system; (3) readiness to implement and support the program as reflected in the Texas Campus STaR Chart; and (4) number of students participating in the program in relation to total student enrollment. Priority will be given to districts demonstrating that a large percentage of their Grades 6-12 student population needs supplemental instruction in one or more content areas. Applications must show evidence of technical readiness to implement and support this grant program and must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA and that are most advantageous to the pilot project evaluation.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. Due to the high cost of printing and mailing RFAs, they will no longer be available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Rebecca Schroeder, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Thursday, September 18, 2008, to be eligible to be considered for funding.

TRD-200803321
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: June 25, 2008

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 4, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is

inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 4, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Ramiro Carrillo dba Bob's Corner Store and Bob's Corner Store 2; DOCKET NUMBER: 2008-0314-PST-E; IDENTIFIER: RN102358942 and RN102457561; LOCATION: Bishop and Kingsville; Nueces and Kleberg Counties; TYPE OF FACILITY: convenience stores with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §334.49(c)(4) and the Code, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection; 30 TAC §334.50(a)(1)(A) and the Code, §26.3475(c)(1), by failing to provide a method of release detection capable of detecting a release from any portion of the underground storage tank (UST) system which contained regulated substances; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; 30 TAC §334.50(b)(2)(A)(ii)(I) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors; and 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available; PENALTY: $18,392; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(2) COMPANY: CastleRock Communities, L.P.; DOCKET NUMBER: 2008-0514-WQ-E; IDENTIFIER: RN105470256; LOCATION: Porter, Montgomery County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain a construction general permit to authorize the discharge of storm water; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2008-0230-IHW-E; IDENTIFIER: RN102320850; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §335.4, by failing to prevent the unauthorized disposal of industrial hazardous waste; and 30 TAC §335.261(a) and 40 CFR §273.34(e) and §273.35(c)(1), by failing to label or mark clearly each lamp or a container or package in which such lamps are contained and failing to be able to demonstrate the length of time that the universal waste has been accumulated; PENALTY: $36,974; Supplemental Environmental Project (SEP) offset amount of $14,790 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Cynthia McKaughan, (512) 239-0735; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(4) COMPANY: Drennan Day Custom Homes Inc.; DOCKET NUMBER: 2008-0491-EAQ-E; IDENTIFIER: RN105469258; LOCATION: Williamson County; TYPE OF FACILITY: single family subdivision construction site; RULE VIOLATED: 30 TAC §213.23(a)(1), by failing to obtain approval of a contributing zone plan prior to conducting a regulated activity over the Edwards Aquifer Contributing Zone; PENALTY: $26,000; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(5) COMPANY: Enbridge Pipelines (NE Texas) L.P.; DOCKET NUMBER: 2008-0342-AIR-E; IDENTIFIER: RN100223783; LOCATION: Camp County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Permit Number 8986, Special Condition (SC) Number 1, General Operating Permit (GOP) Number 514, Federal Operating Permit (FOP) Number O-00875, Special Requirement Numbers (b)(2) and (b)(7)(B), and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain an emission rate below the maximum allowable emission limit for the tail gas thermal oxidizer (TGTO); 30 TAC §116.115(c) and §122.143(4), Permit Number 8986, SC Number 9, GOP Number 514, FOP Number O-00875, Special Requirement Numbers (b)(2) and (b)(7)(B), and THSC, §382.085(b), by failing to maintain the TGTO oxygen content at no less than 3%; 30 TAC §116.115(c) and §122.143(4), Permit Number 8986, SC Number 9, GOP Number 514, FOP Number O-00875, Special Requirement Numbers (b)(2) and (b)(7)(B), and THSC, §382.085(b), by failing to maintain the TGTO firebox chamber temperature at a minimum of 1,000 degrees Fahrenheit; 30 TAC §116.115(c) and §122.143(4), Permit Number 8986, SC Number 13D, GOP Number 514, FOP Number O-00875, Special Requirement Numbers (b)(2) and (b)(7)(B), and THSC, §382.085(b), by failing to properly maintain records for a period of two years and make them readily available upon request; and 30 TAC §122.145(2)(A), GOP Number 514, FOP Number O-00875, Special Requirement Number (b)(2), and THSC, §382.085(b), by failing to report all instances of deviations; PENALTY: $12,954; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(6) COMPANY: Forest Creek Partnership, Ltd. dba Forest Creek Apartments; DOCKET NUMBER: 2007-1898-PWS-E; IDENTIFIER: RN101214559; LOCATION: Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(f)(5) and THSC, §341.0315(c), by failing to provide a production capacity of two gallons per minute per connection for a purchase water system; 30 TAC §290.44(d)(4), by failing to provide accurate metering devices at each residential, commercial, or industrial service connection to provide water usage data; and 30 TAC §290.46(u), by failing to plug and seal the abandoned public water supply well; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Salvador G. Gonzalez dba Gonzalez Dairy; DOCKET NUMBER: 2008-0405-AGR-E; IDENTIFIER: RN101961753; LOCATION: Tom Green County; TYPE OF FACILITY: dairy farm; RULE VIOLATED: 30 TAC §321.47(e)(7), by failing to ensure that retention control structure (RCS) liners are protected from animals by fences or other protective devices and that no tree is allowed to grow such that the root zone would intrude or compromise the structure of the liner; 30 TAC §321.47(e)(6), by failing to maintain

a permanent RCS pond marker; 30 TAC §321.38(e)(7), by failing to provide documentation of sources of information, assumptions, and calculations, used in determining the appropriate volume capacity of the RCS; 30 TAC §321.47(i), by failing to comply with recordkeeping requirements; and 30 TAC §321.47(c)(1), by failing to construct and manage the control facilities in a manner that will protect surface water; PENALTY: $5,775; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(8) COMPANY: M.R. Gonzalez; DOCKET NUMBER: 2008-0669-WQ-E; IDENTIFIER: RN105380067; LOCATION: Fort Stockton, Pecos County; TYPE OF FACILITY: parking lot; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Andrew Hunt, (512) 239-1203; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(9) COMPANY: J. Griffin; DOCKET NUMBER: 2008-0383-PST-E; IDENTIFIER: RN101839173; LOCATION: Atlanta, Cass County; TYPE OF FACILITY: property with USTs; RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, two USTs; and 30 TAC §334.7(d)(3), by failing to provide amended registration for any change or additional information regarding USTs; PENALTY: $6,300; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(10) COMPANY: Sohail Malik dba Hempstead Food Mart; DOCKET NUMBER: 2008-0347-PST-E; IDENTIFIER: RN102371093; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(3) and (6) and THSC, §382.085(b), by failing to maintain Stage II records at the Station and make them immediately available for review; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; and 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Homes Unique, Inc.; DOCKET NUMBER: 2008-0207-WQ-E; IDENTIFIER: RN105202238; LOCATION: Midland, Midland County; TYPE OF FACILITY: construction company; RULE VIOLATED: 30 TAC §281.25(a)(4) and Multi-Sector General Permit Number TXR15F104 Part III, Section F.2., by failing to implement best management practices; and 30 TAC §281.25(a)(4) and Multi-Sector General Permit Number TXR15F104 Part II, Section D.3., by failing to post a copy of the notice of intent in a location where it is readily available for reviewing prior to commencing construction activities; PENALTY: $1,425; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(12) COMPANY: City of Humble; DOCKET NUMBER: 2008-0327-MWD-E; IDENTIFIER: RN102179447; LOCATION: Humble, Harris County; TYPE OF FACILITY: wastewater collection system and a wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010763002, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limitations for fecal coliform bacteria; 30 TAC §305.125(1) and (4), TPDES Permit Number WQ0010763002, Permit Conditions Number 2.g., and the Code, §26.121(a), by failing to prevent unauthorized discharges of wastewater; and the Code, §26.121(a), by failing to prevent unauthorized discharges of wastewater from the sanitary sewer system; PENALTY: $14,300; SEP offset amount of $11,440 applied to Gulf Coast Waste Disposal Authority ("GCWDA") - River, Lakes, Bays 'N Bayous Trash Bash; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Lankford Construction, L.L.C.; DOCKET NUMBER: 2008-0175-WQ-E; IDENTIFIER: RN105368542; LOCATION: Nacogdoches, Nacogdoches County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), TPDES General Permit Number TXR15IF07, Part II, Section D.3.(d) and Part III, Section D.2., and 40 CFR Part 122, by failing to post a notice of intent and a site notice; 30 TAC §281.25(a)(4), TPDES General Permit Number TXR15IF07, Part III, Section D.1., and 40 CFR Part 122, by failing to have the storm water pollution plan and related documents readily available at the time of an on-site investigation; and 30 TAC §281.25(a)(4), TPDES Permit Number TXR15IF07, Part III, Section F.2.(a)(i) and F.2.(a)(ii), the Code, §26.121(a)(2), and 40 CFR Part 122, by failing to properly install and maintain sediment controls resulting in discharges of sediment into an unnamed creek and to an adjacent landowner's pond; PENALTY: $4,200; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(14) COMPANY: La Porte Methanol Company, L.P.; DOCKET NUMBER: 2008-0157-AIR-E; IDENTIFIER: RN102830866; LOCATION: La Porte, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4), Air Permit Number 40938, SC Number 1, FOP Number O-02291, SC 1D, 40 CFR §63.563(b)(7), and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $3,925; SEP offset amount of $1,570 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: Mammoet USA, Inc.; DOCKET NUMBER: 2008-0349-WQ-E; IDENTIFIER: RN104484340; LOCATION: Rosharon, Brazoria County; TYPE OF FACILITY: motor freight transportation and warehousing; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to renew a multi-sector general permit to authorize the discharge of storm water; PENALTY: $6,160; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Murphy Oil USA, Inc. dba Murphy Oil; DOCKET NUMBER: 2007-1242-AIR-E; IDENTIFIER: RN102246915, RN102295672, and RN102991882; LOCATION: El Paso, El Paso County TYPE OF FACILITY: fuel dispensing stations; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the maximum seven pounds per square inch absolute Reid Vapor Pressure requirements; PENALTY: $7,520; ENFORCE-

MENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(17) COMPANY: City of Newark; DOCKET NUMBER: 2008-0464-PWS-E; IDENTIFIER: RN101388536; LOCATION: Newark, Wise County; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.46(q)(1), by failing to issue a boil water notification; and 30 TAC §290.110(c)(4)(B), by failing to monitor the disinfectant residual at representative locations throughout the distribution system; PENALTY: $1,130; SEP offset amount of $904 applied to Keep Texas Beautiful; ENFORCEMENT COORDINATOR: Epifanio Villareal, (210) 490-3096; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Barkat Mohammed dba North Loop Food Store; DOCKET NUMBER: 2008-0345-PST-E; IDENTIFIER: RN101432920; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; and 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; PENALTY: $5,778; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(19) COMPANY: OK Concrete Company; DOCKET NUMBER: 2008-0585-WQ-E; IDENTIFIER: RN102430592; LOCATION: Baylor County; TYPE OF FACILITY: ready mix concrete plant; RULE VIOLATED: 30 TAC §305.42 and the Code, §26.121(a)(1), by failing to obtain authorization to discharge wastewater associated with industrial activities; PENALTY: $1,900; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(20) COMPANY: Oxbow Carbon & Minerals LLC; DOCKET NUMBER: 2008-0468-IWD-E; IDENTIFIER: RN102707049; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0002670000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total suspended solids (TSS); and 30 TAC §305.125(17) and TPDES Permit Number WQ0002670000, Monitoring and Reporting Requirements Number 1, by failing to submit daily average flow at Outfall 001 on the discharge monitoring reports; PENALTY: $4,030; SEP offset amount of $1,612 applied to GCWDA - River, Lakes, Bays 'N Bayous Trash Bash; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: City of Pasadena; DOCKET NUMBER: 2007-1915-MWD-E; IDENTIFIER: RN101608693; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10053009, Effluent Limitations and Monitoring Requirements Number 1 and Contributing Industries and Pretreatment Requirements Number 1.a., 1.d., and 1.f., and the Code, §26.121(a), by failing to comply with permitted effluent limitations for TSS, fecal coliform bacteria, and five-day biochemical oxygen demand and prevent the introduction of pollutants into the treatment facility; 30 TAC §305.125(9) and TPDES Permit Number 10053009, Monitoring and Reporting Requirements Number 7.a. and c., by failing to submit written reports within five working days for any noncompliance which may endanger human health or safety or the environment; 30 TAC §305.125(1) and (5) and §317.4(d), and TPDES Permit Number 10053009, Operational Requirements Number 1 and Monitoring and Reporting Requirements Number 5, by failing to properly operate and maintain the wastewater treatment plant and ensure flow measurement accuracy; 30 TAC §319.7(c) and TPDES Permit Number 10053009, Other Requirements Number 13, by failing to conduct required groundwater monitoring; 30 TAC §305.125(1) and TPDES Permit Number 10053009, Permit Conditions Number 4.c. and Contributing Industries and Pretreatment Requirements Number 1, by failing to timely submit a permit renewal application and an industrial user survey; and 30 TAC §305.125(4) and (5), TPDES Permit Number 10053009, Permit Conditions Number 2.g. and Operational Requirements Number 1, and the Code, §26.121(a), by failing to prevent unauthorized discharges of wastewater from the collection system; PENALTY: $47,220; SEP offset amount of $37,776 applied to Armand Bayou Nature Center Coastal Tall Grass Management-Prescribed Burn Program and Prairie Restoration Project; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: Rincon Water Supply Corporation; DOCKET NUMBER: 2008-0254-PWS-E; IDENTIFIER: RN101194504; LOCATION: San Patricio County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(A) and §290.110(b)(4) and THSC, §341.0315(c), by failing to maintain the residual disinfectant concentration in the water within the distribution system at least 0.5 milligrams per liter (mg/L) chloramine; 30 TAC §290.110(c)(4)(B), by failing to monitor the disinfectant residual at representative locations in the distribution system; 30 TAC §290.46(1), by failing to flush all dead-end mains at monthly intervals, or as needed if water quality complaints are received; 30 TAC §290.43(c)(3), by failing to provide the groundwater storage tank with the overflow located near enough and at a position accessible from a ladder or the balcony for inspection purposes; 30 TAC §290.45(f)(1), by failing to keep on file and make available for commission review a purchase water contract; and 30 TAC §290.110(e)(4), by failing to submit the disinfectant level quarterly operating reports for public water systems; PENALTY: $1,950; SEP offset amount of $1,560 applied to Audubon Society-North Bay Sanctuary Project; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(23) COMPANY: Sam Cicalo dba Sam's Horse and Stock Trailers; DOCKET NUMBER: 2007-1979-AIR-E; IDENTIFIER: RN104461611; LOCATION: Boyd, Wise County; TYPE OF FACILITY: painting and sandblasting plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization prior to conducting painting and sandblasting activities; and 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition of outdoor burning; PENALTY: $6,300; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: Shell Chemical LP and Shell Oil Company; DOCKET NUMBER: 2008-0283-AIR-E; IDENTIFIER: RN100211879; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: chemical manufacturing plant and petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(b)(2)(F), New Source Review (NSR) Permit Number 3219 and PSD-TX-974,

Maximum Allowable Emission Rates, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.20(3) and §116.715(a), Flexible Permit Number 21262 and PSD-TX-928, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $20,000; SEP offset amount of $8,000 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: Shell Oil Company; DOCKET NUMBER: 2007-1789-AIR-E; IDENTIFIER: RN100211879; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), NSR Flexible Permit Number 21262/PSD-TX-928, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.20(3) and §101.221(a), 40 CFR §60.18(c)(2), and THSC, §382.085(b), by failing to keep a flame present at a flare at all times; and 30 TAC §101.20(3) and §116.715(a), NSR Flexible Permit Number 21262/PSD-TX-928, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $80,000; SEP offset amount of $40,000 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: Sid Richardson Carbon, Ltd.; DOCKET NUMBER: 2008-0145-AIR-E; IDENTIFIER: RN100222413; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: carbon black manufacturing operation; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to prevent the release of unauthorized air contaminants into the atmosphere; 30 TAC §122.145(2)(A) and THSC, §382.085(b), by failing to report all instances of deviations; 30 TAC §101.20(2), 40 CFR §63.7(a)(2), and THSC, §382.085(b), by failing to test number three flare within 180 days; and 30 TAC §101.20(2) and §116.115(c), Permit Number 1867A, SC Number 12B, 40 CFR §63.11(b)(3), and THSC, §382.085(b), by failing to properly operate the flare; PENALTY: $24,072; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(27) COMPANY: William Donald Smith dba Sunset Mobile Home Park; DOCKET NUMBER: 2008-0429-MWD-E; IDENTIFIER: RN101703197; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65 and §305.125(2) and the Code, §26.121(a)(1), by failing to maintain authorization for the discharge of wastewater; PENALTY: $21,840; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(28) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-0385-AIR-E; IDENTIFIER: RN104964267; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: industrial organic chemicals plant; RULE VIOLATED: 30 TAC §101.201(b)(1)(G) and (H) and §122.143(4), FOP Number O-01327, General Terms and Conditions (GTC) and SC 2F, and THSC, §382.085(b), by failing to identify in the final record of the reportable emissions event the compound descriptive type of all air contaminants and the estimated total quantities of those compounds; and 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), FOP Number O-01327, GTC and SC 15A, Air Permit Number 20485, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions 1,3-Butadiene, nitrogen oxides (NO_x), and carbon monoxide; PENALTY: $3,224; ENFORCEMENT COORDINATOR: Aaron Houston, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(29) COMPANY: Total Petrochemicals USA, Inc.; DOCKET NUMBER: 2008-0243-AIR-E; IDENTIFIER: RN102457520; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §§101.20(3), 113.340, 115.352(4), 116.115(c), and 122.143(4), 40 CFR §63.167(a)(1) and §63.648(a), NSR Permit Numbers 20381, PSD-TX-1005, and N-044, SC Number 7.E., FOP Number O-02222, Special Terms and Conditions Number 14, and THSC, §382.085(b), by failing to seal two open-ended lines; 30 TAC §§101.20(3), 115.114(a)(4), 116.115(c), and 122.143(4), NSR Permit Numbers 20381, PSD-TX-1005, and N-044, SC Number 6, FOP Number O-02222, STC Numbers 1.A. and 14, and THSC, §382.085(b), by failing to conduct inspections of external floating roof tanks; 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-02222, GTC, and THSC, §382.085(b), by failing to report the occurrence of all deviations in the semi-annual deviation report; 30 TAC §§101.20(3), 106.261(2), 116.115(b)(2)(F), 116.115(c), and 122.143(4), NSR Permit Numbers 20381, PSD-TX-1005, and N-044, SC Number 1, Permit By Rule Number 74442, FOP Number O-02222, GTC and STC Number 14, and THSC, §382.085(b), by failing to comply with the condensate splitter heater combined sulfur dioxide (SO_2) maximum allowable emission rate; 30 TAC §§116.115(b)(2)(F), 116.115(c), and 122.143(4), NSR Permit Number 54026, SC Number 1, FOP Number O-1267, GTC and STC Number 27, and THSC, §382.085(b), by failing to comply with the south flare maximum allowable emission rate (MAER) for SO_2; 30 TAC §§116.115(b)(2)(F), 116.115(c), and 122.143(4), NSR Permit Number 54026, SC Number 1, FOP Number O-1267, GTC and STC Number 27, and THSC, §382.085(b), by failing to comply with the south flare MAER for SO_2, hydrogen sulfide, and NO_x; 30 TAC §101.201(b)(1)(H) and (c) and THSC, §382.085(b), by failing to submit the final report; and 30 TAC §§116.115(b)(2)(F), 116.115(c), and 122.143(4), NSR Permit Number 54026, SC Number 1, FOP Number O-1267, GTC and STC Number 27, and THSC, §382.085(b), by failing to comply with the SO_2 MAER for the north and south flares; PENALTY: $59,329; SEP offset amount of $23,732 applied to Jefferson County: Retrofit/Replacement of Heavy Equipment and Vehicles with Alternative Fueled Equipment and Vehicles; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(30) COMPANY: Weatherford Brothers; DOCKET NUMBER: 2008-0566-WQ-E; IDENTIFIER: RN105386981; LOCATION: Veribest, Tom Green County; TYPE OF FACILITY: crop field; RULE VIOLATED: 30 TAC §210.6(3)(A) and §210.24(d)(9), the Code, §26.121(a), and Authorization for Reclaimed Water Permit Number R10641003, Limitations I.(f), by failing to prevent the discharge of reclaimed water from an irrigation site; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(31) COMPANY: Zapata County; DOCKET NUMBER: 2008-0203-WQ-E; IDENTIFIER: RN105391460; LOCATION: Zapata, Zapata County; TYPE OF FACILITY: wastewater collection system; RULE VIOLATED: the Code, §26.121(a), by failing to prevent the unauthorized discharge of sewage; PENALTY: $5,000; SEP offset amount of $4,000 applied to The Rensselaerville Institute - "Self-Help Rio Grande"; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

TRD-200803295

Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: June 24, 2008

♦ ♦ ♦

Notice of District Hearing

Notice issued June 17, 2008.

TCEQ Docket No. 2005-1651-DIS; The Texas Commission on Environmental Quality (TCEQ) will conduct a hearing on an application for dissolution (Application) of Montgomery County Municipal Utility District No. 71 (District). The Application was filed with the TCEQ and included a petition by LGI Land, LLC, as landowner; Woodforest National Bank, as first lienholder; and Vision Mortgage, Inc., as second lienholder (Applicants), being owners of property located within the District. The TCEQ will conduct this hearing under the authority of Chapters 49 and 54 of the Texas Water Code, Title 30, Chapter 293 of the Texas Administrative Code and the procedural rules of the TCEQ. The TCEQ will conduct the hearing at: 9:30 a.m., Wednesday, September 10, 2008, Building E, Room 201S, 12100 Park 35 Circle, Austin, Texas.

The District was created by Acts 1985, 69 Leg., Chapter 857 (SB 1358) on June 15, 1985. Under this law the District had the authority to operate under Texas Water Code Chapters 49 and 54 as a municipal utility district. The petition filed with the Application states that dissolution is desirable and necessary because the District is not required for the development of land within its boundaries. The petition filed with the Application states that the District: (1) has not performed any of the functions for which it was created for five consecutive years preceding the date of the Application, (2) is financially dormant, and (3) has no outstanding bonded indebtedness. An affidavit from the State Comptroller of Public Accounts has been included in the Application, certifying that the District has no bonded indebtedness.

If the request for dissolution is approved, the District's assets, if any, will escheat to the State of Texas and will be administered by the State Comptroller of Public Accounts and disposed of in the manner provided by Chapter 74 of the Texas Property Code.

The purpose of this hearing is to provide all interested persons the opportunity to appear and offer testimony for or against the proposal contained in the Application. At the hearing, pursuant to TWC §49.324, the TCEQ will determine if the District should be dissolved.

For information regarding the date and time this application will be heard before the TCEQ, please submit written inquiries to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC-103, at the same address. For additional information, individual members of the public may contact the Districts Review Team at (512) 239-4691. General information regarding TCEQ is available on the internet at www.tceq.state.tx.us.

Si desea información en Español, puede llamar al (512) 239-0200.

Persons with disabilities who plan to attend this hearing and who need special accommodations at the hearing should call the TCEQ Office of Public Assistance at 800-687-4040 or 800-RELAY-TX (TDD), at least one week prior to the hearing.

TRD-200803332
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 25, 2008

♦ ♦ ♦

Notice of District Petition

Notice issued June 11, 2008.

TCEQ Internal Control No. 05232008-D01; Pederson 631, L.P. (Petitioner) filed a petition for creation of Fort Bend County Municipal Utility District No. 188 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land, consisting of one tract, to be included in the proposed District; (2) there is one lien holder, Amegy Bank National Association, on the property to be included in the proposed District; (3) the proposed District will contain approximately 631.23 acres located in Fort Bend County, Texas; and (4) the land within the proposed District is within the corporate limits or extraterritorial jurisdiction of the City of Fulshear, Texas (City). According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $51,040,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200803331
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 25, 2008

♦ ♦ ♦

Notice of Water Quality Applications

The following notices were issued during the period of May 30, 2008 through June 24, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CHANNEL SHIPYARD COMPANY INC which operates Channel Shipyard Company WWTP, a general vessel cleaning, degassing, and maintenance and repair facility for barges, has applied for a renewal of TPDES Permit No. WQ0003059000, which authorizes the discharge of treated wastewater associated with barge cleaning and repair operations and storm water at a daily maximum flow not to exceed 5,000 gallons per day via Outfall 001; treated wastewater associated with barge cleaning and repair operations, similar wastewater from San Jacinto Barge Repair, Inc. (TPDES Permit No. WQ0003349000), and storm water at a daily maximum flow not to exceed 70,000 gallons per day via Outfall 002; ballast/void space water on an intermittant and flow variable basis via Outfalls 003 and 004; and storm water from the wastewater treatment plant containment area on an intermittent and flow variable basis via Outfall 005. The facility is located at 999 South Lynchburg Road, adjacent to the Lynchburg Ferry, approximately two miles south of intersection of Interstate Highway 10 and Lynchburg Ferry Road, in the City of Baytown, Harris County, Texas.

CHEVRON PHILLIPS CHEMICAL COMPANY LP which operates an oil field chemical manufacturing plant, has applied for a major amendment to TPDES Permit No. WQ0002475000 to authorize the removal of effluent limitations and monitoring requirements for Total Aluminum at Outfall 001. The current permit authorizes the discharge of treated process wastewater, boiler blowdown, domestic wastewater, and storm water at a daily average flow not to exceed 16,000 gallons per day via Outfall 001; and storm water on an intermittent and flow variable basis via Outfall 002. The facility is located approximately one mile south of the intersection of Farm-to-Market Road 1485 and Jefferson Chemical Road and approximately five miles east of the City of Conroe, Montgomery County, Texas.

CITY OF BEAUMONT has applied for a major amendment to TPDES Permit No. WQ0010501020 to authorize a change in the effluent limitation for Total Suspended Solids (TSS) for the internal outfall 120. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 46,000,000 gallons per day. The facility is located at 4,900 Lafin Road, approximately 3,000 feet south of the intersection of U.S. Highway 69 and State Highway 124 in Jefferson County, Texas.

CITY OF GOLDTHWAITE has applied for renewal of Permit No. WQ0004522000 to authorize the land application of wastewater treatment plant sewage sludge for beneficial use on 30 acres. The land application site is located 500 feet north of the intersection of Farm-to-Market Road 3023 and Texas Highway 16 in Mills County, Texas.

CITY OF GROVES has applied for a renewal of TPDES Permit No. WQ0010094004, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 5,320,000 gallons per day. The facility is located approximately 2,000 feet southeast from the intersection of State Highway 87 and State Highway 73, and adjacent to Taft Avenue Extension in southeast direction from the intersection of State Highways 87 and 73 in Jefferson County, Texas.

CITY OF ITASCA has applied for a renewal of TPDES Permit No. WQ0010423001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 378,000 gallons per day. The facility is located approximately one mile south of the City of Itasca, west of U.S. Highway 81 and adjacent to the Missouri, Kansas and Texas Railroad in Hill County, Texas.

CITY OF PYOTE has applied for a major amendment to Permit No. WQ0013986001. The proposed amendment requests to change the treatment process from mechanical plant (aeration system) to anaerobic septic tank system. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 11,000 gallons per day via surface irrigation of 6.52 acres of non-public access land. The wastewater treatment facility and disposal site are located between U.S. Highway 80 (Business Interstate Route 20) and Interstate Highway 20, approximately 500 feet east of the intersection of Rogers Street (State Highway 115) and U.S. Highway 80 (Business Interstate Route 20) in Ward County, Texas. This permit will not authorize a discharge of pollutants into waters in the State.

CITY OF VALENTINE has applied to the TCEQ for a new permit, Proposed Permit No. WQ0014855001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day via surface irrigation of 11 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site will be located approximately 2,600 feet northwest of the intersection of US Highway 90 and Washington Avenue, outside the city limits of the City of Valentine, in Jeff Davis County, Texas.

ERATH COUNTY DAIRY SALES INC AND JIMMY GAYLON BEYER has applied for a major amendment of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0003211000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate an existing Livestock Auction Barn at a maximum capacity of 1,838 head, increase land application acreage from 20 acres to 30.4 acres, and construct a new wastewater storage pond. The facility is located on the northwest side of US Highway 377, approximately 3 miles southwest of the intersection of US Highway 377 and Farm-to-Market Road 988 in Erath County, Texas.

ESCAPEE'S INC has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014890001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility will be located at 100 Rainbow Drive, approximately 2 miles south of the intersection of Farm-to-Market Road 1988 and State Highway 146 South in Polk County, Texas.

FORT BEND MUNICIPAL UTILITY DISTRICT NO 41 has applied for a renewal of TPDES Permit No. WQ0012475001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 860,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 1,500 feet northwest of the intersection of Voss Road and Old Richmond Road and approximately 5,000 feet west-northwest of the intersection of State Highway 6 and Voss Road in Fort Bend County, Texas.

HAMSHIRE COMMUNITY WATER SUPPLY CORPORATION a Municipal Utility District, has applied for a renewal of TPDES Permit No. WQ0014899001 (formerly TPDES Permit No. WQ0012098003), which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 56,000 gallons per day. The facility is located approximately 0.6 mile north-northeast of Hamshire High School; 6,300 feet southeast of Interstate Highway 10 crossing of

South Fork of Taylor Bayou; and 7,600 feet east-southeast of Interstate Highway 10 at West Hamshire Road in Jefferson County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 71 has applied for a major amendment to TPDES Permit No. WQ0011917001 to authorize the relocation of Outfall 001. The facility is located at 3200 Chesapeake Bend Lane, approximately 250 feet downstream from the previously permitted outfall in Harris County, Texas.

HOUSTON MARINE SERVICES INC has applied for a renewal of TPDES Permit No. WQ0004651000, which authorizes the discharge of barge void and ballast water on an intermittent and flow variable basis via Outfall 001. The facility is located at 850 South Lynchburg Road, approximately two miles south of the Crosby Lynchburg Road Interchange on Interstate Highway 10, Harris County, Texas.

LAMAR POWER PARTNERS II LLC which proposes to operate Lamar Energy Center, Expansion Project, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004846000, to authorize the discharge of cooling tower blowdown, previously monitored effluents, and filter backwash water at a daily average flow not to exceed 1,300,000 gallons per day via Outfall 001. The facility will be located 3,000 feet south of the intersection of Farm-to-Market Road 137 and State Road Loop 286, Lamar County, Texas.

LUMINANT MINING COMPANY LLC which operates the Forest Grove Lignite Mining Area, has applied for a renewal of TPDES Permit No. WQ0002698000, which authorizes the discharge of treated mine water (groundwater seeping into mine pits and dewatering well water) and surface water runoff from "active mining areas, and previously monitored effluents (PMEs) (treated surface water runoff from "post mining area" reclamation areas and PMEs [treated domestic wastewater from Outfall 201] from Outfalls 101 and 102) on an intermittent and flow variable basis via Outfalls 001 and 002. The facility is located within a 20 mile radius of Forest Grove Reservoir, approximately seven miles northwest of the City of Athens, Hendersons and Van Zandt County, Texas.

MARMAC LLC which operates McDonough Marine Service-Channelview Fleet, has applied for a major amendment to TPDES Permit No. WQ0004633000 to authorize less stringent effluent limitations for total suspended solids. The current permit authorizes the discharge of void and ballast water on an intermittent and flow variable basis via Outfall 001. The facility is located at 17500 Market Street, approximately four hundred feet south of the Monmouth Drive Interchange Exit 786 on Interstate 10 in the City of Houston, Harris County, Texas.

MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NO. 89 has applied for a renewal of TPDES Permit No. WQ0013985001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located at 29722-1/2 Legends Ridge Drive # 2, approximately 5,200 feet north of the intersection of Riley Fussell Road and Rayford Road in Montgomery County, Texas.

PORT ARTHUR STEAM ENERGY LP has applied for a renewal of TPDES Permit No. WQ0004725000, which authorizes the discharge of treated boiler blowdown from a heat recovery steam generator (HRSG), demineralized reject and storm water at a daily average flow not to exceed 950,000 gallons per day via Outfall 001. The facility is located on Coke Dock Road near West 7th in the City of Port Arthur, in Jefferson County, Texas.

REICHHOLD INC which operates an organic chemicals manufacturing plant, has applied for a major amendment to TPDES Permit No. WQ0000662000 to authorize a reduction in the biomonitoring frequency at Outfall 001; a reduction in monitoring frequency for biochemical oxygen demand (5-day) and total suspended solids at Outfall 001; and removal of Item 7 in the Other Requirements. The current permit authorizes the discharge of process water, utility wastewater, wash water and storm water at a daily average flow not to exceed 100,000 gallons per day via Outfall 001. The facility is located at 1503 Haden Road, approximately 0.33 mile south of the intersection of Interstate Highway 10 and Market Street in the City of Houston, Harris County, Texas.

SOUTH CENTRAL WATER COMPANY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014868001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility will be located approximately 9700 feet south-south east of the intersection of Chimney Rock Road and McHard Road (Farm-to-Market Road 2234) in Fort Bend County, Texas.

SOUTH CENTRAL WATER COMPANY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014875001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility will be located approximately 2,800 feet North West of the intersection of Garrett Road and Fauna Road in Harris County, Texas.

STEPHEN PAUL KREBS has applied for a renewal of TPDES Permit No. WQ0012691001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 22,500 gallons per day. The facility is located at No. 3806 on Farm-to-Market Road 1942 in Harris County, Texas.

SYNTECH CHEMICALS INC which operates a speciality chemicals manufacturing plant, has applied for a renewal of TPDES Permit No. WQ0003593000 to authorize the discharge of storm water associated with industrial activity at an intermittent and flow variable rate. The facility is located at 14822 Hooper Road, approximately 0.25 miles south of Beltway 8 (Sam Houston Parkway) and approximately one mile west of State Highway 288 in unincorporated Harris County, outside the City of Houston, Texas, Harris County, Texas.

TEXAS INSTRUMENTS INC which operates the Stafford Plant, an electronic components manufacturing plant, has applied for a major amendment to TPDES Permit No. WQ0001225000 to authorize less stringent effluent limitations for total suspended solids at Outfall 001, construction of a wetland treatment unit; use of Aquashade or Azure Blue to Control Algae at the equalization/polishing ponds; removal of storm water - Outfalls 003, 004, 005, 006, and 007; reduce daily average flow at Outfall 001 from 3,000,000 gallons per day to 1,500,000 gallons per day and a daily maximum flow from 3,500,000 gallons per day to 3,000,000 gallons per day; revise technology and water quality based effluent limitations at Outfall 001; revise and clarify language relating to BUMP wastewaters. The current permit authorizes the discharge of process wastewater, pretreated BUMP Cu Resin wastewater, non-process wastewater from site buildings, support wastewater, cooling tower blowdown, and deionization regenerate at a daily average flow not to exceed 3,000,000 gallons per day via Outfall 001; discharge of reverse osmosis (RO) reject water at a daily average flow not to exceed 450,000 gallons per day via Outfall 002; and storm water at intermittent and flow variable from Outfalls 003, 004, 005, 006, and 007. The facility is located at 12201 Southwest Freeway, approximately one mile north of the intersection of U.S. Highway 59 and U.S. Highway 90 in the City of Stafford, Fort Bend County, Texas.

THE LUBRIZOL CORPORATION which operates a chemical plant which manufactures specialty chemicals for use as additives in lube oils, gear oils, and fuels; and chemical monomers for the polymer chemical industry, has applied for a major amendment to TPDES

Permit No. WQ0000639000 to authorize the discharge of groundwater via Outfall 001. The current permit authorizes the discharge of treated process wastewater, domestic wastewater, utility wastewater, and storm water at a daily average dry weather flow not to exceed 1,000,000 gallons per day via Outfall 001; and storm water runoff on an intermittent and flow variable basis via Outfalls 002, 003, 004, 005, 006, and 007. The facility is located at 41 Tidal Road, north of State Highway 225, south of the Port Terminal Railroad, east of Patrick Bayou, and west of the East Fork of Patrick Bayou, in the City of Deer Park, Harris County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

THE SABINE MINING COMPANY which operates South Hallsville Mine No.1, a surface lignite coal mine, has applied for a renewal of TPDES Permit No. WQ0002538000, to authorize the discharge of storm water runoff and mine pit water from ponds in the active mining area on an intermittent and flow variable basis via Outfall 001; the discharge of storm water runoff and mine pit water from ponds in the post mining area on an intermittent and flow variable basis via Outfall 101; and the discharge of treated domestic wastewater at a volume not to exceed a daily average flow of 6,000 gallons per day via Outfall 002. The facility is located at 6501 Farm-to-Market Road 968 West, south of Interstate Highway 20 on Farm-to-Market Road 968, east of Farm-to-Market Road 450, approximately five miles southeast of the City of Hallsville, Harrison County, Texas.

TIN INC which operates the Orange Linerboard Mill, an unbleached kraft pulp/paperboard and corrugated container recycle mill, has applied for a renewal of TPDES Permit No. WQ0001185000, which authorizes the discharge of treated process wastewater, utility wastewater, sanitary wastewater, and storm water at a daily average flow not to exceed 31,000,000 gallons per day via Outfall 001, and utility wastewater and storm water on an intermittent and flow variable basis via Outfall 002. The draft permit authorizes the discharge of treated process wastewater, utility wastewater, sanitary wastewater, and storm water at a daily average flow not to exceed 31,000,000 gallons per day via Outfall 001, non-process area storm water, general facility wash water, eye wash and safety shower station water, fire systems test water, hydrostatic test water, utility water and non-contact cooling water on an intermittent and flow variable basis via Outfall 002. The application also includes a request that a requirement in the existing permit, under Operational Requirements be eliminated in accordance with 30 TAC Chapter 350. The facility is located approximately five miles north of the City of Orange, between State Highway 87 and the Sabine River, north, of West Bluff Road, Orange County, Texas.

WLSK PASADENA LLC which operates a facility which manages an inactive gypsum storage pile associated with historical fertilizer manufacturing at an adjacent site, has applied for a major amendment to TPDES Permit No. WQ0003999000, to authorize the additional discharge of leachate via Outfall 001; revise the daily average flow not to exceed 72,000 gallons per day to an annual average flow not to exceed 72,000 gallons per day via Outfall 001; remove the daily maximum flow limitation of 108,000 million gallons per day at Outfall 001; and increase the single grab concentrations for ammonia-nitrogen to 100 mg/l and fluoride to 75 mg/l at Outfall 001. The current permit authorizes the discharge of treated gypsum pile wastewater and storm water at a daily average flow not to exceed 72,000 gallons per day via Outfall 001. The facility is located on the Houston Ship Channel, at the point where Jefferson Road terminates at the Houston Ship Channel, in the City of Pasadena, Harris County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200803329
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 25, 2008

♦ ♦ ♦

Notice of Water Rights Application

Notice issued June 18, 2008.

APPLICATION NO. 08-5085A; Charles W. Kennedy and Virginia Z. Kennedy, P.O. Box 877 Crockett, TX 75835, Applicants, have applied for an amendment to Certificate of Adjudication No. 08-5085 to add non-consumptive instream use to 175 acre-feet of water per year, Trinity River, Trinity River Basin in Leon County. More information on the application and how to participate in the permitting process is given below. The application and fees were received on February 13, 2007. The application was declared administratively complete and filed with the Office of the Chief Clerk on June 27, 2007. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ

can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200803330
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 25, 2008

♦ ♦ ♦

Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5780 or (800) 325-8506.

Deadline: Lobby Activities Report due February 11, 2008

Mark Seale, P.O. Box 301805, Austin, Texas 78703

Deadline: Lobby Activities Report due March 10, 2008

Mark Seale, P.O. Box 301805, Austin, Texas 78703

Deadline: Personal Financial Statement due February 11, 2008

Melvin 'Van' Brookshire, 8130 State Highway 150 West, Coldsprings, Texas 77331

Phillip S. Smart, P.O. Box 217, Ferris, Texas 75125

Patrick Warren, 8282 Cambridge #602, Houston, Texas 77054

Deadline: Personal Financial Statement due April 30, 2008

Les Bunte, 3329 West Amity Road, Salado, Texas 76571

C. Kent Conine, 5300 Town & Country Boulevard, Suite 190, Frisco, Texas 75034

Kenneth R. Darden, P.O. Box 1005, Livingston, Texas 77351

Conrado 'Connie' de la Garza, 2814 Lotus, Harlingen, Texas 78550

Jose E. de Santiago, Sr., 15927 Jove Street, Houston, Texas 77060

Hector Farias, 705 South Texas Boulevard, Weslaco, Texas 78596

Ricardo Jose Guerra, 2401 South IH-35, Suite 210, Austin, Texas 78741

Anton E. 'Tony' Hackebeil, P.O. Box 220, Hondo, Texas 78861-0220

Edward Johnson, 1711 San Jacinto Boulevard, Austin, Texas 78701

Jack D. Ladd, 3930 Fairwood Court, Midland, Texas 79707-1428

E. Javier Loya, 8607 Pasture View Lane, Houston, Texas 77024-7039

Rogelio 'Roy' Martinez, 1305 Fullerton Avenue, McAllen, Texas 78504

Lee William McNutt III, 3716 McFarlin, Dallas, Texas 75205

Isabel C. Menendez, M.D., P.O. Box 849, Portland, Texas 78374

John C. Morris, 213 Cottontail Drive, Leander, Texas 78641

Cliff Mountain, 2909 Meandering River court, Austin, Texas 78746

Cindy Ramos-Davidson, 520 Pinar Del Rio, El Paso, Texas 79932

John W. Riddle, 12615 Brandi Lane, Willis, Texas 77378

Asa Wesley Sampson, Sr., 2206 Canterbury Drive, League City, Texas 77573

Rebecca Spurlock, 7449 Woodhaven Drive, North Richland Hills, Texas 76180

Gene Stallings, 6508 County Road 43200, Powderly, Texas 75473

Calvin W. Stephens, 9429 Rocky Branch Drive, Dallas, Texas 75243

Galen Ray Sumrow, 1101 Ridge Road, Suite 104, Rockwall, Texas 75087

Deadline: 8-Day Pre-Election Report due February 25, 2008

Tracy A. Smith, Wise County Active Democrats, 1562 County Road 2625, Decatur, Texas 76234

Deadline: Monthly Report due April 7, 2008

Phyllis A. Traylor, Montgomery County Law Enforcement Association, P.O. Box 2545, Conroe, Texas 77305-2545

Deadline: 8-Day Pre-Election Report due May 2, 2008

Eugene M. Rackley IV, Coca-Cola Enterprises, Inc. Employees Nonpartisan Committee, 2500 Windy Ridge Parkway, Atlanta, Georgia 30339

TRD-200803283
David A. Reisman
Executive Director
Texas Ethics Commission
Filed: June 23, 2008

♦ ♦ ♦

Texas Facilities Commission

Request for Proposals #303-8-11903

The Texas Facilities Commission (TFC), on behalf of the Department of Public Safety (DPS), announces the issuance of Request for Proposals (RFP) #303-8-11903. TFC seeks a five or ten year lease of approximately 1,825 square feet of office space in Fort Worth, Tarrant, Texas.

The deadline for questions is July 11, 2008 and the deadline for proposals is July 18, 2008 at 3:00 p.m. The award date is August 20, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=77398*.

TRD-200803334
Kay Molina
General Counsel
Texas Facilities Commission
Filed: June 25, 2008

♦ ♦ ♦

Request for Proposals #303-8-11953

The Texas Facilities Commission (TFC), on behalf of the Department of Family and Protective Services, announces the issuance of Request for Proposals (RFP) #303-8-11953. TFC seeks a five year lease of approximately 4,295 square feet of office space in Granbury, Hood County, Texas.

The deadline for questions is July 11, 2008 and the deadline for proposals is July 18, 2008 at 3:00 p.m. The award date is August 20, 2008.

TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=77370*.

TRD-200803308
Kay Molina
General Counsel
Texas Facilities Commission
Filed: June 24, 2008

♦ ♦ ♦

Request for Proposals #303-8-11954

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission, announces the issuance of Request for Proposals (RFP) #303-8-11954. TFC seeks a 5 year lease of approximately 11,127 square feet of office space in Dallas, Dallas County, Texas.

The deadline for questions is July 11, 2008 and the deadline for proposals is July 21, 2008 at 3:00 p.m. The award date is August 20, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=77380*.

TRD-200803309
Kay Molina
General Counsel
Texas Facilities Commission
Filed: June 24, 2008

♦ ♦ ♦

Request for Proposals #303-8-11957

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC), announces the issuance of Request for Proposals (RFP) #303-8-11957. TFC seeks a five year lease of approximately 4,171 square feet of office space in Kaufman, Kaufman County, Texas.

The deadline for questions is July 11, 2008 and the deadline for proposals is July 21, 2008 at 3:00 p.m. The award date is August 20, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=77383*.

TRD-200803336
Kay Molina
General Counsel
Texas Facilities Commission
Filed: June 25, 2008

♦ ♦ ♦

General Land Office

Notice of Extension of Public Comment Period

The General Land Office (GLO) hereby gives notice that it is providing an additional 30-day extension of the period for public comment for a total of 90 days for proposed rule amendments and new rules concerning 31 TAC Chapter 15 relating to Coastal Area Planning, Subchapter A, Management of the Beach/Dune System, and Subchapter B, Coastal Erosion Planning and Response originally published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3885) and (33 TexReg 3894) respectively. The initial 30-day extension was published in the June 13, 2008, issue of the *Texas Register* (33 TexReg 4748).

The GLO proposed amendments to §15.2, relating to definitions of small and large scale construction and restoration and §15.3, relating to review periods for large and small scale construction, standard and expedited periods for review of local government beach and dune plans by the GLO, and determination of the line of vegetation by the GLO necessary for establishing the boundary of the public beach easement. The GLO proposed an amendment to §15.8, relating to beach user fees. The GLO also proposed new §15.16 and amended §15.41 in order to provide guidelines for local governments to establish Erosion Response Plans (ERPs) that incorporate a building set-back line.

To comment on the proposed rulemaking, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., August 15, 2008.

TRD-200803242
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: June 23, 2008

♦ ♦ ♦

Notice of Public Hearings on Proposed Amendments and New Rules Relating to Erosion Response Plans

The Texas General Land Office (GLO) will conduct public hearings in the City of Galveston and on Bolivar Peninsula on July 8, 2008, to receive public comment on proposed rule amendments and new rules concerning 31 TAC Chapter 15 relating to Coastal Area Planning, Management of the Beach/Dune System, and Coastal Erosion Planning and Response originally published in the May 16, 2008, issue of the *Texas Register* at (33 TexReg 3885) and (33 TexReg 3894). The GLO proposed amendments to §15.2, relating to definitions; amendments to §15.3, relating to review periods for proposed construction, review periods for local government beach and dune plans, and determination of the line of vegetation by the GLO; and §15.8, relating to beach user fees. The GLO also proposed new §15.16 and amended §15.41 in order to provide guidelines for local governments to establish erosion response plans that incorporate a building set-back line.

The hearings will be held in compliance with §2001.029 of the Texas Government Code to provide all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing on the proposed rulemaking. A public hearing will be held in the City of Galveston on Tuesday, July 8, 2008, 11:00 a.m. to 2:00 p.m. The hear-

ing in the City of Galveston will be held in the Jury Assembly Room on the 1st floor of the Galveston County Justice Center located at 600 59th Street in Galveston, Texas. Note: Persons attending the public hearing in the City of Galveston should allow sufficient time for routine security screening for entry to the County Justice Center.

A public hearing will also be held on Bolivar Peninsula on July 8, 2008 from 4:00 p.m. to 6:00 p.m. The hearing on Bolivar Peninsula will be held in the Galveston County Annex Building located at 946 Noble Carl Road in Crystal Beach, Texas. Note: The Galveston County Annex is located directly behind the Crystal Beach Community Center facing Texas Highway 87 approximately 9.9 miles from the ferry landing.

Written comments regarding the proposed rule may be submitted in lieu of testimony at the hearing or may be sent by U.S. mail to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us no later than August 15, 2008. Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Carly Bohn, Coastal Resources Program, Texas General Land Office, P.O. Box 12873 Austin, Texas 78711-2873, (512) 463-3550, by July 7, 2008, so that appropriate arrangements can be made.

TRD-200803320
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: June 25, 2008

♦ ♦ ♦

Department of State Health Services

Notice of Availability of Texas Community Mental Health Services State Plan (Federal Community Mental Health Block Grant)

The Federal Community Mental Health Block Grant statute (42 USC 300x-51) requires that the Department of State Health Services (department) make the Texas Community Mental Health Services State Plan available for public comment during its development.

The department is currently preparing the plan for Fiscal Year (FY) 2009 to describe the intended use of the Federal Community Mental Health Block Grant funds. These funds must be utilized by the department to develop new initiatives and/or enhance already existing service delivery systems for adults with severe mental illness and children with serious emotional disturbance.

When the draft of the FY 2009 Texas Community Mental Health Services State Plan is available (on or about July 14, 2008), it may be obtained on the department's website http://www.dshs.state.tx.us/mhsa/mhbg; or by contacting Mary Sowder at the following address: Operation Services, Community Mental Health and Substance Abuse Section, Department of State Health Services, Mail Code: 2053, P.O. Box 149347, Austin, Texas 78714-9347; telephone (512) 206-5814.

Comments regarding the FY 2009 Texas Community Mental Health Services State Plan should be directed to: MHBG@dshs.state.tx.us; or Mary Sowder, Operation Services, Community Mental Health and Substance Abuse Section, Department of State Health Services, Mail Code: 2053, P.O. Box 149347, Austin, Texas 78714-9347.

Comments must be received by 5:00 p.m. Central Daylight Saving Time, Thursday, August 14, 2008.

TRD-200803176
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: June 20, 2008

♦ ♦ ♦

Notice of Opportunity for Public Comment on the Fiscal Year 2009 Statewide Substance Abuse Block Grant (Federal Substance Abuse Prevention and Treatment Block Grant)

Federal statutes (42 USC 300x-21-64) governing the Substance Abuse Prevention and Treatment Block Grant (SAPTBG) include provisions that require the state to provide an annual report of current service activities and make available for public comment a description of the intended use of block grant funds in advance of each federal fiscal year.

The funds made available through the SAPTBG are to be used for maintaining and enhancing a quality statewide substance abuse service system and highlighting priority issues related to federally-funded substance abuse prevention and treatment services statewide. When the SAPTBG Intended Use Plan is available (on or about July 21, 2008), it can be obtained on the Department of State Health Services (department) website http://www.dshs.state.tx.us/mhsa/sabg; or by contacting Mary Sowder at the following address: Operation Services, Community Mental Health and Substance Abuse Section, Department of State Health Services, Mail Code: 2053, P.O. Box 149347, Austin, Texas 78714-9347; telephone (512) 206-5814.

Public comments received by the department will be considered in the preparation and development of the FY 2009 Continuation Application.

Comments regarding the FY 2009 SAPTBG and the Intended Use Plan should be directed to: SAPTBG@dshs.state.tx.us; or Mary Sowder, Operation Services, Community Mental Health and Substance Abuse Section, Department of State Health Services, Mail Code: 2053, P.O. Box 149347, Austin, Texas 78714-9347.

Comments must be received by 5:00 p.m. Central Daylight Saving Time, Thursday, August 14, 2008.

TRD-200803175
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: June 20, 2008

♦ ♦ ♦

Texas Health and Human Services Commission

Notice of Hearing on Proposed Payment Rate

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public rate hearing to receive public comment on the proposed payment rate for breast reconstruction procedures provided by Ambulatory Surgical Centers (ASC) and Hospital Ambulatory Surgical Centers (HASC) services. HHSC is responsible for determining reimbursement amounts for the Texas Medicaid Program.

The rate hearing will be held on Monday, July 21, 2008, at 10:00 a.m. in the Palo Duro Canyon Conference Room of the Braker Center, Building H, at 11209 Metric Boulevard, Austin, Texas 78758-4021. Entry is through Security at the entrance of 11209 Metric Boulevard. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) §355.201(e) - (f) and Texas Human Resources Code §32.0282, which require public hearings on proposed payment rates for medical assistance programs.

Proposal. The proposed payment rate is for breast reconstruction with deep inferior epigastric perforator (diep) flap, including microvascular anastomosis and closure of donor site, unilateral, under HCPCS code S2068 for type of service F. This affects payments made to ASCs and HASCs. The proposed payment rate will be effective July 1, 2008.

Methodology and justification. The proposed rate was determined in accordance with the rate reimbursement setting methodology at 1 TAC §355.8121, which addresses the reimbursement methodology for ASCs and HASCs.

Written Comments. Written comments regarding the proposed reimbursement rate may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Amber Lovett, HHSC Rate Analysis, MC H-400, P.O. Box 85200, Austin, Texas 78708-5200 or by email to amber.lovett@hhsc.state.tx.us. Express mail can be sent, or written comments can be hand delivered, to Ms. Lovett, HHSC Rate Analysis, MC H-400, Braker Center Building H, at 11209 Metric Boulevard, Austin, Texas 78758-4021. Alternatively, written comments may be sent via facsimile to Ms. Lovett at (512) 491-1998.

Briefing Package. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rate on or after July 7, 2008, by contacting Ms. Lovett by telephone at (512) 491-1371, or by email to amber.lovett@hhsc.state.tx.us, or by mail HHSC Rate Analysis, MC H-400 P.O. Box 85200, Austin, Texas 78708-5200. Briefing packages also will be available at the hearing.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1174 by July 18, 2008, so appropriate arrangements can be made.

TRD-200803312
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: June 24, 2008

♦ ♦ ♦

Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit to the Centers for Medicare and Medicaid Services an amendment to the Women's Health Program (WHP) demonstration waiver, which is a Medicaid family planning waiver under the authority of §1115 of the Social Security Act. The proposed effective date of this amendment is October 1, 2008.

The WHP provides family planning services for uninsured women, ages 18 through 44, who are not otherwise eligible for Medicaid, the State Children's Health Insurance Program, or Medicare, and have a family income at or below 185 percent of the Federal Poverty Level. The waiver program is authorized under Human Resources Code §32.0248, which lists the general categories of services which may be covered under the program.

The waiver amendment proposes to include the following new benefits and procedure codes under the program:

1) One code for a new office client visit;

2) Two codes for the ultrasound exam of the abdomen (to locate a missing intrauterine device);

3) One code for the ultrasound of an extremity (to locate a missing implanted contraceptive rod in the arm, brand name Implanon);

4) Four new contraceptive method codes related to the implanted contraceptive rod, brand name Implanon;

5) Four new lab test codes: a) Thyroid Stimulating Hormone (to rule out thyroid problems when a woman has missed her period for several months), b) Three Herpes tests; and

6) Three codes related to Essure, a non-surgical sterilization method.

These specific benefits are allowable under the general categories of services provided under the current waiver and under Human Resources Code §32.0248. These additional benefits will make WHP coverage more similar to the family planning services offered through the Department of State Health Services family planning programs funded through Titles V and XX of the Social Security Act and Title X of the Public Health Service Act.

This amendment to the demonstration waiver will maintain budget neutrality for each year that the waiver is in effect. The waiver has been approved for a five-year period from 2007 through 2011.

To obtain copies of the waiver amendment, or to make comments on this waiver amendment, interested parties may contact Carmen Samilpa-Hernandez by mail at Health and Human Services Commission, P.O. Box 85200, H-620, Austin, Texas 78708-5200; by telephone at (512) 491-1128; by facsimile at (512) 491-1953; or by e-mail at carmen.samilpa-hernandez@hhsc.state.tx.us.

TRD-200803310
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: June 24, 2008

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application for incorporation to the State of Texas by NEW CENTURY INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Temple Texas.

Application to change the name of WESTERN DIVERSIFIED CASUALTY INSURANCE COMPANY to ARCH INDEMNITY INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Omaha, Nebraska.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200803323
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: June 25, 2008

♦ ♦ ♦

Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2685 on July 18, 2008, at 9:30 a.m., in Room 100 of the William P. Hobby, Jr., State Office Building, 333 Guadalupe Street, Austin, Texas 78701, to consider the reappointment of a public representative to the Board of Directors of the Texas Windstorm Insurance Association (Association). Georgia Rutherford Neblett, an Association policyholder and a resident of Port Aransas, Texas, has

been nominated by the Office of Public Insurance Counsel (OPIC) to be reappointed to the Board of the Association to serve a three-year term as one of two public representatives.

The hearing is held pursuant to the Insurance Code §2210.008, which provides that the Commissioner, after notice and hearing, may issue any orders considered necessary to carry out the purposes of the Insurance Code Chapter 2210. Any person may appear and testify for or against the proposed appointment.

The Insurance Code §2210.102(a) provides that the Association's Board of Directors shall be composed of nine members. The Insurance Code §2210.102(a)(2) provides that two of the Association's board members shall be public representatives who are nominated by OPIC and who, as of the date of the appointment, reside in a catastrophe area, and are policyholders of the Association. The Insurance Code §2210.102(b) also specifies that the persons appointed as public representatives must be from different counties.

The Insurance Code §2210.103(a) provides that members of the Association's Board of Directors serve three-year staggered terms with the terms of three members expiring on the third Tuesday of March of each year.

Any questions concerning this matter should be addressed to Marilyn Hamilton, Associate Commissioner, Personal and Commercial Lines Division, MC 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

TRD-200803206
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: June 20, 2008

♦ ♦ ♦

Notice of Public Hearing

The Commissioner of Insurance (Commissioner) will hold a public hearing under Docket No. 2688, on July 18, 2008, at 9:30 a.m., in Room 100 of the William P. Hobby, Jr., State Office Building, 333 Guadalupe Street, Austin, Texas 78701, to consider a proposal by the Texas Windstorm Insurance Association (TWIA) seeking an upward modification to the ten percent (10%) surcharge applicable to TWIA policies of windstorm and hail insurance that are issued on residential structures that qualify under TWIA regulations that specify eligibility criteria for structures to be approved for insurability without an inspection. TWIA has requested approval of an increase in the surcharge from the current ten percent (10%) to fifteen percent (15%).

Pursuant to the Insurance Code §2210.251(a), to be considered insurable property by TWIA, the property must be inspected or approved by the Department of Insurance (Department) for compliance with the TWIA plan of operation. The TWIA regulations that allow structures to be approved for insurability without an inspection are approved pursuant to the plan of operation, and are necessary to provide an approval process to provide wind and hail insurance coverage that may be otherwise unavailable to residential structures currently insured in the voluntary market that do not have a certificate of compliance as evidence of insurability as required by TWIA.

The Insurance Code §2210.351 requires TWIA to file with the Department every manual of classifications, rules, rates (including condition charges), rating plan, and every modification of any of the foregoing which it proposes to use.

The Insurance Code §2210.008 provides that the Commissioner, after notice and hearing, may issue any order considered necessary to carry out the purposes of the Texas Windstorm Insurance Association Act, including but not limited to, maximum rates, competitive rates, and policy forms.

The hearing is held pursuant to the Insurance Code §2210.008 and §2210.351. Any person may appear to testify for or against the approval of the proposed increase in the surcharge for residential policies as specified in this proposal.

A copy of TWIA's surcharge filing is available for review in the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104. To request a copy of the surcharge filing, please contact Sylvia Gutierrez at (512) 463-6327 (refer to Reference No. P-0208-04).

TRD-200803207
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: June 20, 2008

♦ ♦ ♦

Texas Lottery Commission

Instant Game Number 1082 "Lucky Dice Doubler"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1082 is "LUCKY DICE DOUBLER". The play style is "add up with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1082 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1082.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1 DICE SYMBOL, 2 DICE SYMBOL, 3 DICE SYMBOL, 4 DICE SYMBOL, 5 DICE SYMBOL, 6 DICE SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $25.00, $50.00, $100, $500, $2,000 and $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1082 - 1.2D

PLAY SYMBOL	CAPTION
1 DICE SYMBOL	ONE
2 DICE SYMBOL	TWO
3 DICE SYMBOL	THR
4 DICE SYMBOL	FOR
5 DICE SYMBOL	FIV
6 DICE SYMBOL	SIX
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$2,000	TWO THOU
$20,000	20 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $2,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1082), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1082-0000001-001.

K. Pack - A pack of "LUCKY DICE DOUBLER" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LUCKY DICE DOUBLER" Instant Game No. 1082 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "LUCKY DICE DOUBLER" Instant Game is determined once the latex on the ticket is scratched off to expose 24 (twenty-four) Play Symbols. If the player's total is 7 (seven) within a ROLL, the player wins the PRIZE shown for that ROLL. If the player's total is 11 within a ROLL, the player wins DOUBLE the PRIZE shown for that ROLL. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 24 (twenty-four) Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 24 (twenty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 24 (twenty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 24 (twenty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate non-winning ROLLS in the same order on a ticket.

C. No three or more matching non-winning prize symbols on a ticket.

D. A ROLL will total "11" (doubler) only as dictated by the prize structure.

E. No single ROLL will create "snake eyes" which are two "1" dice.

F. The top prize will appear on every ticket unless otherwise restricted.

G. Winning prize amounts will never be the same as non-winning prize amounts on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "LUCKY DICE DOUBLER" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "LUCKY DICE DOUBLER" Instant Game prize of $2,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LUCKY DICE DOUBLER" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "LUCKY DICE DOUBLER" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "LUCKY DICE DOUBLER" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1082. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1082 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	787,920	10.20
$4	659,280	12.20
$5	96,480	83.33
$10	112,560	71.43
$20	48,240	166.67
$50	35,567	239.52
$100	12,931	621.76
$500	950	8,463.16
$2,000	20	402,000.00
$20,000	9	893,333.33

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.59. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1082 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1082, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200803172
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 19, 2008

♦ ♦ ♦

Instant Game Number 1088 "Triple Tripler"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1088 is "TRIPLE TRIPLER". The play style is "key number match with tripler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1088 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1088.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 3X, 9X, $3.00, $6.00, $9.00, $10.00, $15.00, $18.00, $24.00, $30.00, $60.00, $90.00, $300, $3,000, and $30,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1088 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
3X	WINX3
9X	WINX9
$3.00	THREE$
$6.00	SIX$
$9.00	NINE$
$10.00	TEN$
$15.00	FIFTN
$18.00	EGHTN

$24.00	TWY FOR
$30.00	THIRTY
$60.00	SIXTY
$90.00	NINTY
$300	THR HUND
$3,000	THR THOU
$30,000	30 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $3.00, $6.00, $9.00, $15.00, $18.00 or $24.00.

G. Mid-Tier Prize - A prize of $30.00, $60.00, $90.00 or $300.

H. High-Tier Prize - A prize of $3,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1088), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1088-0000001-001.

K. Pack - A pack of "TRIPLE TRIPLER" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLE TRIPLER" Instant Game No. 1088 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TRIPLE TRIPLER" Instant Game is determined once the latex on the ticket is scratched off to expose 33 (thirty-three) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins PRIZE shown for that number. If a player reveals a "3X" play symbol, the player wins 3 (three) TIMES the PRIZE shown for that symbol. If a player reveals a "9X" play symbol, the player wins 9 (nine) TIMES the prize shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 33 (thirty-three) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 33 (thirty-three) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 33 (thirty-three) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 33 (thirty-three) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork

on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "3X" (tripler) and "9X" (win X 9) play symbols will only appear on intended winning tickets and only as dictated by the prize structure.

C. No three (3) or more matching non-winning prize symbols on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 3 and $3).

H. The top prize will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE TRIPLER" Instant Game prize of $3.00, $6.00, $9.00, $15.00, $18.00, $24.00, $30.00, $60.00, $90.00 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $30.00, $60.00, $90.00 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TRIPLE TRIPLER" Instant Game prize of $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE TRIPLER" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TRIPLE TRIPLER" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TRIPLE TRIPLER" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1088. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1088 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	322,560	15.63
$6	443,520	11.36
$9	90,720	55.56
$15	30,240	166.67
$18	50,400	100.00
$24	40,320	125.00
$30	40,320	125.00
$60	15,414	326.98
$90	5,460	923.08
$300	1,176	4,285.71
$3,000	16	315,000.00
$30,000	6	840,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.85. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1088 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1088, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200803173

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 19, 2008

♦ ♦ ♦

Instant Game Number 1089 "Triple Dough $$$"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1089 is "TRIPLE DOUGH $$$". The play style is "key number match with tripler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1089 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1089.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, $$$ SYMBOL, $1.00, $2.00, $3.00, $4.00, $5.00, $6.00, $10.00, $20.00, $30.00, $60.00, $100 and $300.

D. Play Symbol Caption - printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1089 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
$$$ SYMBOL	TPL
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$4.00	FOUR$
$5.00	FIVE$
$6.00	SIX$
$10.00	TEN$
$20.00	TWENTY
$30.00	THIRTY
$60.00	SIXTY
$100	ONE HUND
$300	THR HUND

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $4.00, $6.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $60.00, $100 or $300.

H. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

I. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1089), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1089-0000001-001.

J. Pack - A pack of "TRIPLE DOUGH $$$" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

K. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

L. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLE DOUGH $$$" Instant Game No. 1089 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TRIPLE DOUGH $$$" Instant Game is determined once the latex on the ticket is scratched off to expose 12 (twelve) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to either WINNING NUMBER play symbol, the player wins PRIZE shown for that number. If a player reveals a "$$$" play symbol, the player wins TRIPLE the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 12 (twelve) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 12 (twelve) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 12 (twelve) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 12 (twelve) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

D. Non-winning prize symbols will never be the same as the winning prize symbol(s).

E. No duplicate WINNING NUMBERS play symbols on a ticket.

F. The top prize will appear on every ticket unless otherwise restricted by the prize structure.

G. The "$$$" (tripler) play symbol will only appear on winning tickets as dictated by the prize structure.

H. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE DOUGH $$$" Instant Game prize of $1.00, $2.00, $3.00, $4.00, $6.00, $10.00, $20.00, $30.00, $60.00, $100 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $30.00, $60.00, $100 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. As an alternative method of claiming a "TRIPLE DOUGH $$$" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

D. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TRIPLE DOUGH $$$" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TRIPLE DOUGH $$$" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1089. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1089 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	672,000	15.00
$2	739,200	13.64
$3	369,600	27.27
$4	117,600	85.71
$6	67,200	150.00
$10	84,000	120.00
$20	24,150	417.39
$30	6,510	1,548.39
$60	3,360	3,000.00
$100	966	10,434.78
$300	336	30,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.83. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1089 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1089, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200803333
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 25, 2008

♦ ♦ ♦

Instant Game Number 1100 "Find the 9's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1100 is "FIND THE 9'S". The play style is "match 3 of 6 with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1100 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1100.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $1.00, $2.00, $3.00, $5.00, $30.00, $50.00, $300 and 9.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1100 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$30.00	THIRTY
$50.00	FIFTY
$300	THR HUND
9	NINE

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $5.00, $9.00 or $19.00.

G. Mid-Tier Prize - A prize of $30.00, $50.00, $90.00 or $300.

H. High-Tier Prize - A prize of $999.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1100), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1100-0000001-001.

K. Pack - A pack of "FIND THE 9'S" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 146 to 150 will be on the last page with backs exposed. Tickets 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "FIND THE 9'S" Instant Game No. 1100 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "FIND THE 9'S" Instant Game is determined once the latex on the ticket is scratched off to expose 6 (six) Play Symbols. If a player reveals 3 matching amounts in the play area, the player wins that amount. If a player reveals any "9" play symbols in the play area, the player wins the corresponding prize in the prize legend. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 6 (six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 6 (six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 6 (six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 6 (six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No ticket will contain two sets of three matching prize amounts.

C. No ticket will contain 4 or more like prize amounts.

D. No ticket will contain more than four "9" play symbols.

E. No ticket will contain one or more "9" symbols and three like prize symbols.

F. The "9" play symbol will only appear on intended winning tickets as dictated by the prize structure.

G. Tickets can only win once (and will win only the highest amount shown).

2.3 Procedure for Claiming Prizes.

A. To claim a "FIND THE 9'S" Instant Game prize of $1.00, $2.00, $3.00, $5.00, $9.00, $19.00, $30.00, $50.00, $90.00 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $30.00, $50.00, $90.00 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "FIND THE 9'S" Instant Game prize of $999, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "FIND THE 9'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "FIND THE 9'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "FIND THE 9'S" Instant Game, the Texas

Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,160,000 tickets in the Instant Game No. 1100. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1100 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	2,520,000	8.00
$2	940,800	21.43
$3	403,200	50.00
$5	235,200	85.71
$9	168,000	120.00
$19	67,200	300.00
$30	21,000	960.00
$50	12,600	1,600.00
$90	10,668	1,889.76
$300	420	48,000.00
$999	168	120,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.60. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1100 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1100, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200803174
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 19, 2008

♦ ♦ ♦

Texas Parks and Wildlife Department

Notice of Hearing and Opportunity for Public Comment

This is a notice of an opportunity for public comment and a public hearing on Delta County's application to obtain a Texas Parks and Wildlife Department (TPWD) permit to dredge state-owned sand and gravel

from the North Sulphur River bed in Delta County at the following five locations:

1. Approximately three miles northeast of Pecan Gap, Delta County, Texas, starting at a point two miles upstream from Farm to Market Road 38 and extending downstream for 1.36 miles adjacent to properties of J.C. Lancaster and Eddie Preas.

2. Approximately 3.5 miles northeast of Enloc, Delta County, Texas, Exit County Road 4715, starting at a point of 1,250 feet downstream of the Southern Pacific bridge and extending downstream for 1,350 feet adjacent to the property of Joe Foust.

3. Approximately two miles north of Vasco, Delta County, Texas, starting at a point 11.9 miles downstream of the State Highway 24 bridge and extending downstream for 3,000 feet adjacent to the property of L.D. Malone.

4. Approximately one mile north of Pacio, Delta County, Texas, starting at a point 8.2 miles downstream of the State Highway 24 bridge and extending downstream for 3,000 feet adjacent to the properties of B.T. Ruthart and Burt Farms, Inc.

5. Approximately one mile north of Kensing, Delta County, Texas, starting at a point 14 miles downstream of the State Highway 24 bridge and extending downstream for 3,120 feet adjacent to the property of L.D. Malone.

The hearing will be held on August 5, 2008, at 1:30 p.m. at TPWD Headquarters, 4200 Smith School Road, Austin, Texas 78744.

The hearing is not a contested case hearing under the Administrative Procedure Act.

Written comments must be submitted within 30 days of the publication of this notice in the *Texas Register* or the newspaper, whichever is later, or at the public hearing.

Submit written comments, questions, or requests to review the application to: Beth Hilliard, TPWD, by mail to 4200 Smith School Road, Austin, Texas 78744; fax (512) 389-4482; e-mail Beth.Hilliard@tpwd.state.tx.us; telephone (512) 389-4770.

TRD-200803317
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: June 25, 2008

♦ ♦ ♦

Notice of Solicitation of Design Services for 2008-2009 Capital Repair Program

The Infrastructure Division of the Texas Parks and Wildlife Department (TPWD) issued a Request for Qualifications (RFQ) for Professional Design Services as part of its implementation of the agency's 2008-2009 Capital Repair Program on July 1, 2008.

Detailed information about the requirements and selection process are provided in the RFQ.

Information regarding the RFQ solicitation is available electronically on TPWD's website: *http://www.tpwd.state.tx.us/business/bidops/current_bid_opportunities/construction/* and on the Electronic State Business Daily website at *http://esbd.cpa.state.tx.us*.

Hard-copy documents relating to the issuance of the solicitation for Professional Design Services are also available at no charge by calling (512) 389-4442 or by e-mailing a request to contracting@tpwd.state.tx.us.

Solicitation Background.

TPWD has assembled approximately 58 capital repair projects into three discrete design "packages" for the purposes of solicitation and execution to expedite project delivery and to create maximum efficiency and potential cost savings. The projects are organized into three geographic regions that reflect the organization of the Infrastructure Division staff. The Infrastructure Division staff includes project managers, contract managers, planning and design staff, construction managers, inspectors and project accountants. All staff will be active in monitoring these design and construction projects

The project list that is included in the solicitation identifies the three design packages and the general description of each project and estimated construction budget within each design package. The goal of the solicitation is to award a Professional Design Services contract to the most qualified respondent for each geographic region in accordance with Texas Government Code, Chapter 2254. Any firm may respond to one or more of the packages; however, TPWD does not intend to award more than three design contracts in connection with the solicitation.

TRD-200803318
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: June 25, 2008

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On June 16, 2008, Time Warner Cable filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60670. Applicant intends to reflect a change in ownership/control.

The Application: Application of Time Warner Cable for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 35780.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 9, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35780.

TRD-200803226
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 20, 2008

♦ ♦ ♦

Notice of Application for Approval of the ERCOT System Administration Fee

On June 17, 2008, the Electric Reliability Council of Texas (ERCOT) filed with the Public Utility Commission of Texas (commission) its application for approval of the ERCOT system administration fee. ERCOT requests commission approval of the following proposed changes in the fees it charges: (1) an increase in the System Administration Fee to $0.5698 per MWh; (2) an increase in the Security Screening Study fee that is part of ERCOT's Generation Interconnection or Change Re-

quest procedure. The new fee would charge $10,000 to $15,000 for each study based on the megawatts of generation capacity proposed, with additional charges for larger projects; and (3) elimination of the Texas Non-ERCOT Load Serving Entity Fee.

The ERCOT System Administration Fee will affect all Qualified Scheduling Entities (QSEs). ERCOT requests a January 1, 2009 effective date for the fees proposed in this proceeding.

Persons who wish to intervene or comment should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. A request to intervene shall include a statement of position containing a concise state of the requestor's position on the application, a concise statement of each question of fact, law, or policy that the requestor considers at issue and a concise statement of the requestor's position on each issue identified. All comments and interventions should reference Docket Number 35785.

ERCOT has posted this notice and a copy of its fee and rate application on its web site at http://www.ercot.com/about/governance/legal_notices. Interested parties may also access ERCOT's 2008 Fee Filing Package through the Public Utility Commission's web site at http://www.puc.state.tx.us under Docket Number 35785 - *Application of the Electric Reliability Council of Texas for Approval of the ERCOT System Administration Fee*.

TRD-200803228
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 20, 2008

♦ ♦ ♦

Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on June 20, 2008, and amended on June 23, 2008, for designation as an eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of USFon, Inc. for Designation as an Eligible Telecommunications Carrier (ETC). Docket Number 35801.

The Application: The company is requesting ETC designation in order to be eligible to receive federal and state universal service funding to assist it in providing universal service in Texas. Pursuant to 47 U.S.C. §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as ET's for service areas set forth by the commission. USFon seeks ETC designation in those portions of the Austin, Dallas, Houston, San Antonio, and Corpus Christi Local Access and Transport Areas where Southwestern Bell Telephone Company d/b/a AT&T Texas is currently the incumbent local exchange carrier.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by July 24, 2008. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 35801.

TRD-200803322
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 25, 2008

♦ ♦ ♦

Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on June 16, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas's request for a full code of 10,000 consecutive numbers to satisfy the request of University of Texas Health Science Center in the Houston rate center to meet their business needs.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 35782.

The Application: Southwestern Bell Telephone Company submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because Southwestern Bell Telephone Company d/b/a AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 9, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35782.

TRD-200803227
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 20, 2008

♦ ♦ ♦

Texas Residential Construction Commission

Notice of Application for Designation as a "Texas Star Builder"

The commission adopted rules regarding the procedures for designation as a "Texas Star Builder" at 10 TAC §303.300. The rules were adopted pursuant to §416.011, Property Code (Act effective Sept. 1, 2003), which provides that the commission shall establish rules and procedures through which a builder can be designated as a "Texas Star Builder." The commission rules for application for designation can be found on the commission's website at www.trcc.state.tx.us

10 TAC §303.300(i)(2) requires the commission to publish in the *Texas Register* notice of the application of each person seeking to become designated as a "Texas Star Builder" registered under this subchapter. The commission will accept public comment on each application for twenty-one (21) days after the date of publication of the notice. Information provided in response to this notice will be utilized in evaluating the applicants for approval. The Texas Star Builder designation requires that a builder or remodeler demonstrate that its education, experience and commitment to professionalism sets the builder or remod-

eler apart from its peers and offers some assurance to its customers that its quality of service and construction will be above average.

Pursuant to 10 TAC §303.300(i)(2) the commission hereby notices the application(s) for designation as a "Texas Star Builder" of:

Stone Acorn Builders LLC, 4950 Bissonnet Street, Suite 220, Bellaire, Texas 77401. Stone Acorn Builders LLC holds TRCC builder registration #8132. The applicant's registered agent is Sarah Lavine-Kass.

Elegance in Design Custom Homes Ltd., 2918 Turkey Knob, Boerne, Texas 78006. Elegance in Design Custom Homes Ltd. holds TRCC builder registration #26255. The applicant's registered agent is Ed Hall.

Interested persons may send written comments regarding this application to Susan K. Durso, General Counsel, The Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711-3509. Comments regarding this application will be accepted for twenty-one days following the date of publication of this notice in the *Texas Register*. Thereafter, the comments will not be considered as timely filed.

TRD-200803313
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: June 25, 2008

♦ ♦ ♦

Office of Rural Community Affairs

Notice of Release of Request for the Rural Technology Center Grant Program

On July 11, 2008, the Office of Rural Community Affairs will release a Request for Proposals (RFP) for the Rural Technology Center Grant Program (program). The proposal requirements are contained in the RFP which may be obtained at http://www.orca.state.tx.us/ and http://esbd.cpa.state.tx.us/. The purpose of the program is to award grants to public institutions of higher education, public high schools, and governmental entities located in a rural county for the development and operation of Rural Technology Centers that provide community access to technology; computer literacy programs; educational programs designed to provide concurrent enrollment credit for high school students taking postsecondary courses in information and emerging technologies; training for careers in technology-related fields and other highly skilled industries; and technology related continuing and adult education programs. The goal of the program is to increase community access to technology and promote computer literacy. Centers will provide resources to prepare residents, including high school students, for careers in applied technology and other skilled industries. In accordance with the General Appropriations Act for the 2008-2009 Biennium, funding for this round of applications is limited to public institutions of higher education, public high schools, and governmental entities in Zapata County. The RFP may be viewed and printed from the Internet on http://www.orca.state.tx.us/ and http://esbd.cpa.state.tx.us/.

Due Date

An original and six copies of a written proposal are due to the Office of Rural Community Affairs no later than 4:00 p.m. on August 11, 2008. No proposals will be accepted after this deadline. Proposals may be sent or hand carried to:

Charles S. (Charlie) Stone, Executive Director

Office of Rural Community Affairs

Mail: P.O. Box 12877, Austin, Texas 78711

By hand: 1700 N. Congress Avenue, Suite 220, Austin, Texas 78701

Attention: Executive Director

Potential respondents may pose written questions concerning this RFP by e-mail. Contact Charles S. (Charlie) Stone, Executive Director, at cstone@orca.state.tx.us until 12:00 Noon, August 8, 2008. The contact person for this RFP is Charles S. (Charlie) Stone at (512) 936-6701.

TRD-200803319
Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Filed: June 25, 2008

♦ ♦ ♦

Stephen F. Austin State University

Notice of Consultant Contract Amendment

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of amendment of the University's contract with consultant Marsha Jacobson, 3217 Bryan St., Nacogdoches, Texas 75965. The original contract was in the sum of $28,000 for five years, not to exceed $140,000, with a beginning date of September 11, 2007 and ending date of July 1, 2012. The contract award was published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7550). The contract will be amended to increase the consultant's time from 56 days each year to approximately 70 days per year for the remaining four years of the project. This will increase the contract cost to $35,000 per year for years two through five for an additional cost of $28,000, which will increase the total cost of the contract to $168,000.

Documents, films, recording, or reports of intangible results may be presented by the outside consultant.

For further information, please call (936) 468-2908.

TRD-200803167
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: June 19, 2008

♦ ♦ ♦

Notice of Consultant Contract Renewal

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of renewal of the University's contract with consultant Charles H. Warlick, Ph.D, 4306 Oak Creek Dr., Nacogdoches, Texas 75965. The original contract was in the sum of $20,720 plus expenses. The first renewal was published in the August 27, 2004, issue of the *Texas Register* (29 TexReg 8451). The second renewal was published in the July 1, 2005, issue of the *Texas Register* (30 TexReg 3913). The third renewal was published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7763). The contract will be renewed beginning September 1, 2008 and continue through August 31, 2009 with a total amount not to exceed $10,000.

No documents, films, recording, or reports of intangible results will be required to be presented by the outside consultant.

For further information, please call David Justus at (936) 468-4101.

TRD-200803168

R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: June 19, 2008

♦ ♦ ♦

Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Wellington, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Texas Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

The following is a listing of proposed projects at Marian Airpark during the course of the next five years through multiple grants.

Current Project: TxDOT CSJ No. 0725WLNGT. Scope: Provide engineering/design services to construct phase 1 of runway 17-35, construct connecting taxiway to runway 17 end, and mark runway 17-35.

The DBE goal is set at race neutral. TxDOT Project Manager is Russell Deason.

Future scope work items for engineering/design services within the next five years may include, but are not necessarily limited to, the following:

1. Rehabilitate apron
2. Construct turnarounds
3. Rehabilitate, widen, and mark runways
4. Reconstruct and mark T-hangar TW
5. Extend runway
6. Construct/relocate hangar access TW
7. Install MIRL and PAPI
8. Install fencing
9. Install segmented circle
10. Grading and drainage improvements

The City of Wellington reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria and 5010 drawing are available online at **www.txdot.gov/avn/avninfo/notice/consult/index.htm** by selecting "Marian Airpark." The proposal should address a technical approach for the current scope. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at **www.txdot.gov/services/aviation/consultant.htm**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is an MS Word Template.

Please note:

Four completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than July 28, 2008 at 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Amy Slaughter.

The consultant selection committee will be composed of TxDOT Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at **http://www.txdot.gov/services/aviation/consultant.htm**. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews of the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation Division for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Delia Molina, Grant Manager. For technical questions, please contact Russell Deason, Project Manager.

TRD-200803303
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: June 24, 2008

♦ ♦ ♦

Notice of Opportunity to Comment - Compliance Rules

The Texas Department of Transportation (department) is soliciting comments for potential revisions to various department rules including, but not limited to, Title 43 Texas Administrative Code:

Chapter 6, State Infrastructure Bank

Chapter 9, Subchapter G, Contractor Sanctions

Chapter 15, Subchapter A, §15.3, Organization, Structure, and Responsibilities of Metropolitan Planning Organizations

Chapter 15, Subchapter H, Transportation Corporations

Chapter 25, Subchapter I, Safe Routes to School Program

Chapter 25, Subchapter M, Traffic Safety Program

Chapter 26, Regional Mobility Authorities

Chapter 27, Subchapter E, Financial Assistance for Toll Facilities

Chapter 30, Subchapter C, Aviation Facilities Development and Financial Assistance Rules

Chapter 31, Subchapter A, General

Chapter 31, Subchapter B, State Programs

Chapter 31, Subchapter C, Federal Programs

Chapter 31, Subchapter D, Program Administration

Chapter 31, Subchapter F, Rail Fixed Guideway System State Safety Oversight Program

Public trust and confidence is of the utmost importance to the department and the department desires that its partners in transportation exhibit a high commitment to ethical behavior. Fraudulent activity and noncompliance with laws force all Texans to pay more for goods and services. The purpose of the proposed rule changes will be to require that an organization that receives grants or loans from the department certify to the department that it has an ethics and compliance program in place that at a minimum includes the following:

1. Establish compliance standards and procedures to be followed by employees and other agents.

2. Assign high-level personnel to have overall responsibility for overseeing compliance with such standards and procedures.

3. Use care to avoid delegating substantial discretionary authority to individuals whom the organization knows, or should have reason to know, have a propensity to engage in illegal activities.

4. Effectively communicate the standards and procedures to all employees by requiring participation in training and by disseminating publications that explain in understandable language what is required.

5. Take reasonable steps to achieve compliance with standards by utilizing monitoring and auditing systems that have been designed to reasonably detect noncompliance, and provide and publicize a system for employees and other agents to report suspected noncompliance without fear of retaliation.

6. Consistently enforce the standards through appropriate disciplinary mechanisms.

7. Take all reasonable steps to respond appropriately to detected offenses and to prevent future similar offenses.

The purpose of the proposed rule changes to Chapter 9, Subchapter G, Contractor Sanctions, is to provide a possible mitigating circumstance for imposing sanctions if the contractor had an ethics and compliance program in place at the time of the offense.

Some of the issues the department is seeking comments on are:

1. Any impact to organizations of the requirement of the certification of an ethics and compliance program.

2. Specific requirements of an ethics and internal compliance program.

The department is seeking both general ideas and specific language suggestions. Comments on specific text changes should include the appropriate citations to sections, subsections, paragraphs, etc. for proper reference.

The department will accept written comments concerning these rules. Written comments should be addressed to Bob Jackson, General Counsel, 125 East 11th Street, Austin, Texas 78701. The deadline for receipt of written comments is 5:00 p.m., August 4, 2008.

The department will not respond individually to comments received pursuant to this notice. The information gathered from the written comments will be used to assist the department in developing rule proposals for the requirement of an ethics and compliance program for department partners.

TRD-200803159

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: June 18, 2008

♦ ♦ ♦

Public Notice - Aviation

Pursuant to Texas Transportation Code, §21.111, and 43 Texas Administrative Code §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

www.txdot.gov/about_us/public_hearings_and_meetings/aviation.htm

Or visit **www.txdot.gov**, click on Citizen, click on Public Hearings, and then click on Aviation.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, telephone: (512) 416-4501 or 1-800-68-PILOT.

TRD-200803302
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: June 24, 2008

♦ ♦ ♦

The Texas A&M University System

Award of Consultant Contract

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, The Texas A&M University System furnishes this notice of consultant contract award. A notice for request for proposals was published in the April 11, 2008, issue of the *Texas Register* (33 TexReg 3076).

Description of Activities:

Review and assessment of current Texas Engineering Extension Service (TEEX) capabilities and capacities to successfully pursue, capture, and win strategic grants and contracts in both the private and public sector.

Vendor:

Shipley Associates

653 North Main Street

Farmington, Utah 84025

Mark Wigginton

Telephone: (512) 919-4522

Fax: (512) 297-4654

Email: mwigginton@shipleywins.com

Total Contract Value:

$28,745.00

Beginning/Ending Dates:

Beginning: June 9, 2008

Ending: On or about July 14, 2008

Due Date of Final Report:

On or about July 14, 2008

TRD-200803160
Vickie Burt Spillers
Executive Secretary to the Board
The Texas A&M University System
Filed: June 18, 2008

♦ ♦ ♦

Request for Qualifications

Texas A&M University-Corpus Christi is seeking qualifications responses for a consultant to conduct an Academic Program Needs Assessment.

Request for Qualifications (RFQ) No.: RFQ 8-0004 may be obtained by contacting:

David Dávila, C.P.M.

Associate Director, Purchasing

Texas A&M University-Corpus Christi

6300 Ocean Drive, Unit 5731

Corpus Christi, Texas 78412-5731

Telephone: (361) 825-2616

Or email at david.davila@tamucc.edu

Texas A&M University-Corpus Christi is seeking qualifications responses for a consultant to conduct higher education market research (including, but not limited to review of existing market and enrollment data, interviews with key stakeholders in designated markets, and surveys of current and potential users of higher education) to determine opportunities and priorities for: 1) adding degree programs for areas in which we currently have planning authority but no programs; 2) adding degree programs in areas in which we do not presently have planning authority; 3) expanding programs which we currently offer; 4) adding distance education programs; and 5) identifying programs for which transfer student opportunities exist. Proposals must be received on or before 2:00 p.m. central time on July 25, 2008.

TRD-200803166
Vickie Burt Spillers
Executive Secretary to the Board
The Texas A&M University System
Filed: June 19, 2008

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affecte***d. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).